CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 34 DECEMBER 13, 2000 NO. 50

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

Please visit the U.S. Customs Web at:
http://www.customs.gov

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402

U.S. Customs Service

Treasury Decisions

(T.D. 00-83)

SYNOPSES OF DRAWBACK RULINGS

The following are synopses of drawback rulings approved June 12, 1998 to June 17, 1999, inclusive, pursuant to Subparts A & B, Part 191 of the Customs Regulations.

In the synopses below are listed for each drawback ruling approved under 19 U.S.C. 1313(a) and (b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the date the application was signed, the Port Director to whom the ruling was forwarded or approved by, the date on which it was approved and the ruling number.

Date: November 30, 2000.

WILLIAM G. ROSOFF,
(for John Durant, Director,
Commercial Rulings Division.)

(A) Company: **Allied Signal Inc.**
Section 1313(a) articles: Polyamide 6
Section 1313(a) merchandise: Polymer Chip
Section 1313(b) articles: Staple Fiber
Section 1313(b) merchandise: Liquid Polyamide 6
Application signed: May 6, 1999
Ruling Forwarded to PD of Customs: Houston, June 17, 1999
Effect on other rulings: None
Ruling: 41-01696-000 and 44-05753-000

(B) Company: **Best Foods**
Section 1313(a) articles: Not modified
Section 1313(a) merchandise: Not modified
Section 1313(b) articles: Not modified
Section 1313(b) merchandise: Not modified
Supplemental application signed: April 24, 1998

Modification approved by PD of Customs in accordance with §191.8(g)(2): New York, May 28, 1998
Effect on other rulings: Modifies **T.D. 87-75, 41-01454-000 and 44-04662-000**, to cover change in company name from **CPC International Inc.**
Rulings: 41-01454-001 and 44-04662-001

(C) Company: **Brown & Williamson Tobacco Corp.**
Section 1313(a) articles: Cigarette tobaccos; cigarettes
Section 1313(a) merchandise: Oriental or Turkish Tobaccos; Menthol
Section 1313(b) articles: Cigarette tobaccos; cigarettes; smoking (pipe) tobaccos, granulated or cut-plug
Section 1313(b) merchandise: Flue-cured and burley tobaccos; raw sugar; cigarette papers; aluminum foil; menthol; dual charcoal filter rod; polypropylene film
Application signed: September 11, 1997
Ruling forwarded to PD of Customs: Chicago & New York, January 9, 1998
Effect on other rulings: Revokes **T.D. 91-94-A**
Rulings: 41-01744-000 and 44-05367-000

(T.D. 00–84)

FOREIGN CURRENCIES

Daily Rates for Countries Not On Quarterly List For November, 2000

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and other concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CRF 159, Subpart C).

Holiday(s): November 23, 2000.

Austria schilling:

November 1, 2000	$0.062382
November 2, 2000	.062455
November 3, 2000	.062600
November 4, 2000	.062600
November 5, 2000	.062600
November 6, 2000	.062382
November 7, 2000	.062375
November 8, 2000	.062201
November 9, 2000	.062310
November 10, 2000	.062680
November 11, 2000	.062680
November 12, 2000	.062680
November 13, 2000	.062550
November 14, 2000	.062302
November 15, 2000	.062281
November 16, 2000	.062004
November 17, 2000	.061888
November 18, 2000	.061888
November 19, 2000	.061888
November 20, 2000	.061670
November 21, 2000	.061467
November 22, 2000	.061212
November 23, 2000	.061212
November 24, 2000	.060914
November 25, 2000	.060914
November 26, 2000	.060914
November 27, 2000	.061772
November 28, 2000	.062113
November 29, 2000	.062331
November 30, 2000	.063182

Belgium franc:

November 1, 2000	$0.021279
November 2, 2000	.021304
November 3, 2000	.021354
November 4, 2000	.021354

November 5, 2000	.021354
November 6, 2000	.021279
November 7, 2000	.021277
November 8, 2000	.021217
November 9, 2000	.021254
November 10, 2000	.021381
November 11, 2000	.021381
November 12, 2000	.021381
November 13, 2000	.021336
November 14, 2000	.021252
November 15, 2000	.021244
November 16, 2000	.021150
November 17, 2000	.021111
November 18, 2000	.021111
November 19, 2000	.021111
November 20, 2000	.021036
November 21, 2000	.020967
November 22, 2000	.020880
November 23, 2000	.020880
November 24, 2000	.020778
November 25, 2000	.020778
November 26, 2000	.020778
November 27, 2000	.021071
November 28, 2000	.021187
November 29, 2000	.021262
November 30, 2000	.021552

Finland markka:

November 1, 2000	$0.144373
November 2, 2000	.144541
November 3, 2000	.144877
November 4, 2000	.144877
November 5, 2000	.144877
November 6, 2000	.144373
November 7, 2000	.144356
November 8, 2000	.143952
November 9, 2000	.144204
November 10, 2000	.145062
November 11, 2000	.145062
November 12, 2000	.145062
November 13, 2000	.144759
November 14, 2000	.144188
November 15, 2000	.144137
November 16, 2000	.143498
November 17, 2000	.143229
November 18, 2000	.143229
November 19, 2000	.143229
November 20, 2000	.142724
November 21, 2000	.142253
November 22, 2000	.141665
November 23, 2000	.141665
November 24, 2000	.140975
November 25, 2000	.140975
November 26, 2000	.140975
November 27, 2000	.142960

November 28, 2000	.143750
November 29, 2000	.144255
November 30, 2000	.146223

France franc:

November 1, 2000	$0.130862
November 2, 2000	.131015
November 3, 2000	.131320
November 4, 2000	.131320
November 5, 2000	.131320
November 6, 2000	.130862
November 7, 2000	.130847
November 8, 2000	.130481
November 9, 2000	.130710
November 10, 2000	.131487
November 11, 2000	.131487
November 12, 2000	.131487
November 13, 2000	.131213
November 14, 2000	.130695
November 15, 2000	.130649
November 16, 2000	.130070
November 17, 2000	.129826
November 18, 2000	.129826
November 19, 2000	.129826
November 20, 2000	.129368
November 21, 2000	.128941
November 22, 2000	.128408
November 23, 2000	.128408
November 24, 2000	.127783
November 25, 2000	.127783
November 26, 2000	.127783
November 27, 2000	.129582
November 28, 2000	.130298
November 29, 2000	.130756
November 30, 2000	.132539

Germany deutsche mark:

November 1, 2000	$0.438893
November 2, 2000	.439404
November 3, 2000	.440427
November 4, 2000	.440427
November 5, 2000	.440427
November 6, 2000	.438893
November 7, 2000	.438842
November 8, 2000	.437615
November 9, 2000	.438382
November 10, 2000	.440989
November 11, 2000	.440989
November 12, 2000	.440989
November 13, 2000	.440069
November 14, 2000	.438331
November 15, 2000	.438177
November 16, 2000	.436234
November 17, 2000	.435416
November 18, 2000	.435416

November 19, 2000	.435416
November 20, 2000	.433882
November 21, 2000	.432451
November 22, 2000	.430661
November 23, 2000	.430661
November 24, 2000	.428565
November 25, 2000	.428565
November 26, 2000	.428565
November 27, 2000	.434598
November 28, 2000	.437001
November 29, 2000	.438535
November 30, 2000	.444517

Greece drachma:

November 1, 2000	$0.002528
November 2, 2000	.002525
November 3, 2000	.002535
November 4, 2000	.002535
November 5, 2000	.002535
November 6, 2000	.002523
November 7, 2000	.002525
November 8, 2000	.002516
November 9, 2000	.002520
November 10, 2000	.002533
November 11, 2000	.002533
November 12, 2000	.002533
November 13, 2000	.002530
November 14, 2000	.002519
November 15, 2000	.002520
November 16, 2000	.002509
November 17, 2000	.002503
November 18, 2000	.002503
November 19, 2000	.002503
November 20, 2000	.002494
November 21, 2000	.002481
November 22, 2000	.002475
November 23, 2000	.002475
November 24, 2000	.002463
November 25, 2000	.002463
November 26, 2000	.002463
November 27, 2000	.002497
November 28, 2000	.002510
November 29, 2000	.002518
November 30, 2000	.002552

Ireland pound:

November 1, 2000	$1.089943
November 2, 2000	1.091213
November 3, 2000	1.093752
November 4, 2000	1.093752
November 5, 2000	1.093752
November 6, 2000	1.089943
November 7, 2000	1.089816
November 8, 2000	1.086769
November 9, 2000	1.088673

November 10, 2000	1.095149
November 11, 2000	1.095149
November 12, 2000	1.095149
November 13, 2000	1.092864
November 14, 2000	1.088546
November 15, 2000	1.088166
November 16, 2000	1.083341
November 17, 2000	1.081309
November 18, 2000	1.081309
November 19, 2000	1.081309
November 20, 2000	1.077500
November 21, 2000	1.073944
November 22, 2000	1.069500
November 23, 2000	1.069500
November 24, 2000	1.064294
November 25, 2000	1.064294
November 26, 2000	1.064294
November 27, 2000	1.079277
November 28, 2000	1.085245
November 29, 2000	1.089054
November 30, 2000	1.103910

Italy lira:

November 1, 2000	$0.000443
November 2, 2000	.000444
November 3, 2000	.000445
November 4, 2000	.000445
November 5, 2000	.000445
November 6, 2000	.000443
November 7, 2000	.000443
November 8, 2000	.000442
November 9, 2000	.000443
November 10, 2000	.000445
November 11, 2000	.000445
November 12, 2000	.000445
November 13, 2000	.000445
November 14, 2000	.000443
November 15, 2000	.000443
November 16, 2000	.000441
November 17, 2000	.000440
November 18, 2000	.000440
November 19, 2000	.000440
November 20, 2000	.000438
November 21, 2000	.000437
November 22, 2000	.000435
November 23, 2000	.000435
November 24, 2000	.000433
November 25, 2000	.000433
November 26, 2000	.000433
November 27, 2000	.000439
November 28, 2000	.000441
November 29, 2000	.000443
November 30, 2000	.000449

Luxemboug franc:

November 1, 2000	$0.021279
November 2, 2000	.021304
November 3, 2000	.021354
November 4, 2000	.021354
November 5, 2000	.021354
November 6, 2000	.021279
November 7, 2000	.021277
November 8, 2000	.021217
November 9, 2000	.021254
November 10, 2000	.021381
November 11, 2000	.021381
November 12, 2000	.021381
November 13, 2000	.021336
November 14, 2000	.021252
November 15, 2000	.021244
November 16, 2000	.021150
November 17, 2000	.021111
November 18, 2000	.021111
November 19, 2000	.021111
November 20, 2000	.021036
November 21, 2000	.020967
November 22, 2000	.020880
November 23, 2000	.020880
November 24, 2000	.020778
November 25, 2000	.020778
November 26, 2000	.020778
November 27, 2000	.021071
November 28, 2000	.021187
November 29, 2000	.021262
November 30, 2000	.021552

Netherlands guilder:

November 1, 2000	$0.389525
November 2, 2000	.389979
November 3, 2000	.390886
November 4, 2000	.390886
November 5, 2000	.390886
November 6, 2000	.389525
November 7, 2000	.389480
November 8, 2000	.388390
November 9, 2000	.389071
November 10, 2000	.391385
November 11, 2000	.391385
November 12, 2000	.391385
November 13, 2000	.390569
November 14, 2000	.389026
November 15, 2000	.388890
November 16, 2000	.387165
November 17, 2000	.386439
November 18, 2000	.386439
November 19, 2000	.386439
November 20, 2000	.385078
November 21, 2000	.383807
November 22, 2000	.382219

November 23, 2000	.382219
November 24, 2000	.380359
November 25, 2000	.380359
November 26, 2000	.380359
November 27, 2000	.385713
November 28, 2000	.387846
November 29, 2000	.389207
November 30, 2000	.394517

Portugal escudo:

November 1, 2000	$0.004282
November 2, 2000	.004287
November 3, 2000	.004297
November 4, 2000	.004297
November 5, 2000	.004297
November 6, 2000	.004282
November 7, 2000	.004281
November 8, 2000	.004269
November 9, 2000	.004277
November 10, 2000	.004302
November 11, 2000	.004302
November 12, 2000	.004302
November 13, 2000	.004293
November 14, 2000	.004276
November 15, 2000	.004275
November 16, 2000	.004256
November 17, 2000	.004248
November 18, 2000	.004248
November 19, 2000	.004248
November 20, 2000	.004233
November 21, 2000	.004219
November 22, 2000	.004201
November 23, 2000	.004201
November 24, 2000	.004181
November 25, 2000	.004181
November 26, 2000	.004181
November 27, 2000	.004240
November 28, 2000	.004263
November 29, 2000	.004278
November 30, 2000	.004337

South Korea won:

November 1, 2000	$0.000879
November 2, 2000	.000881
November 3, 2000	.000880
November 4, 2000	.000880
November 5, 2000	.000880
November 6, 2000	.000881
November 7, 2000	.000878
November 8, 2000	.000880
November 9, 2000	.000883
November 10, 2000	.000880
November 11, 2000	.000880
November 12, 2000	.000880
November 13, 2000	.000876

November 14, 2000	.000876
November 15, 2000	.000878
November 16, 2000	.000876
November 17, 2000	.000874
November 18, 2000	.000874
November 19, 2000	.000874
November 20, 2000	.000864
November 21, 2000	.000856
November 22, 2000	.000848
November 23, 2000	.000848
November 24, 2000	.000840
November 25, 2000	.000840
November 26, 2000	.000840
November 27, 2000	.000841
November 28, 2000	.000841
November 29, 2000	.000831
November 30, 2000	.000822

Spain peseta:

November 1, 2000	$0.005159
November 2, 2000	.005165
November 3, 2000	.005177
November 4, 2000	.005177
November 5, 2000	.005177
November 6, 2000	.005159
November 7, 2000	.005158
November 8, 2000	.005144
November 9, 2000	.005153
November 10, 2000	.005184
November 11, 2000	.005184
November 12, 2000	.005184
November 13, 2000	.005173
November 14, 2000	.005152
November 15, 2000	.005151
November 16, 2000	.005128
November 17, 2000	.005118
November 18, 2000	.005118
November 19, 2000	.005118
November 20, 2000	.005100
November 21, 2000	.005083
November 22, 2000	.005062
November 23, 2000	.005062
November 24, 2000	.005038
November 25, 2000	.005038
November 26, 2000	.005038
November 27, 2000	.005109
November 28, 2000	.005137
November 29, 2000	.005055
November 30, 2000	.005225

Taiwan N.T. dollar:

November 1, 2000	$0.030902
November 2, 2000	.031008
November 3, 2000	.031104
November 4, 2000	.031104

November 5, 2000	.031104
November 6, 2000	.031104
November 7, 2000	.031104
November 8, 2000	.031124
November 9, 2000	.031153
November 10, 2000	.031182
November 11, 2000	.031182
November 12, 2000	.031182
November 13, 2000	.031085
November 14, 2000	.031075
November 15, 2000	.031104
November 16, 2000	.031017
November 17, 2000	.030950
November 18, 2000	.030950
November 19, 2000	.030950
November 20, 2000	.030788
November 21, 2000	.030769
November 22, 2000	.030395
November 23, 2000	.030395
November 24, 2000	.030395
November 25, 2000	.030395
November 26, 2000	.030395
November 27, 2000	.030395
November 28, 2000	.030441
November 29, 2000	.030230
November 30, 2000	.030230

RICHARD B. LAMAN
Chief,
Customs Information Exchange.

(T.D. 00–85)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATE FOR NOVEMBER, 2000

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision *** for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates:

Holiday(s): November 23, 2000.

Australia dollar:	
November 20, 2000	$0.513400
November 21, 2000	.511200
Brazil real:	
November 06, 2000	$0.515198
November 07, 2000	.511640
November 08, 2000	.511509
November 09, 2000	.509424
November 10, 2000	.512558
November 11, 2000	.512558
November 12, 2000	.512558
November 13, 2000	.510465
November 14, 2000	.514139
November 15, 2000	.513084
November 16, 2000	.513479
November 17, 2000	.508130
November 18, 2000	.508130
November 19, 2000	.508130
November 24, 2000	.510465
November 25, 2000	.510465
November 26, 2000	.510465
November 27, 2000	.509554
November 28, 2000	.505051
November 29, 2000	.510725
November 30, 2000	.507048
Denmark krone:	
November 24, 2000	$0.112334
November 25, 2000	.112334
November 26, 2000	.112334
South Africa rand:	
November 07, 2000	$0.131165
November 08, 2000	.130472
November 09, 2000	.129157

November 10, 2000	.131544
November 11, 2000	.131544
November 12, 2000	.131544
November 13, 2000	.130719
November 14, 2000	.130582
November 15, 2000	.130056
November 16, 2000	.130124
November 17, 2000	.129744
November 18, 2000	.129744
November 19, 2000	.129744
November 20, 2000	.128742
November 21, 2000	.127877
November 22, 2000	.127714
November 23, 2000	.127714
November 24, 2000	.127632
November 25, 2000	.127632
November 26, 2000	.127632
November 27, 2000	.128684
November 28, 2000	.128411
November 29, 2000	.128634
November 30, 2000	.129032

Sweden krona:

November 20, 2000	$0.097909
November 21, 2000	.097078
November 22, 2000	.097069
November 23, 2000	.097069
November 24, 2000	.096525
November 25, 2000	.096525
November 26, 2000	.096525
November 27, 2000	.097632

RICHARD B. LAMAN
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notices

ANNOUNCEMENT OF A GENERAL PROGRAM TEST REGARDING POST-ENTRY AMENDMENT PROCESSING

AGENCY: Customs Service, Treasury.

ACTION: General notice.

SUMMARY: This notice announces Customs plan to conduct a test program that allows importers to amend already filed entry summaries prior to liquidation by filing a post entry amendment on either an individual or quarterly basis, depending on the type of error being corrected. The notice invites public comments concerning any aspect of the test, informs interested members of the public how to participate in the test, and describes the procedure to be followed by test participants.

DATES: The test will commence no earlier than December 28, 2000 and will run for approximately one year. The test may be extended if warranted. Comments concerning this notice and all aspects of the announced test must be received on or before December 28, 2000.

ADDRESSES: Written comments may be submitted to and inspected at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., 3rd Floor, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Bruce Ingalls, Office of Field Operations (202-927-1082).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Liquidation Procedure and Post Entry Amendment Filing

Liquidation is the process by which Customs, after receiving the entry summary filed by the importer/broker (hereafter referred to as the importer or importers) relative to an entry or release of merchandise into the United States, fixes the final appraisement, classification, and assessment of duties, taxes, and fees respecting that en-

tered merchandise (19 U.S.C. 1500). Under 19 U.S.C. 1514, an importer can challenge a liquidation by filing a protest within 90 days of the date of liquidation. Under 19 U.S.C. 1501, Customs has the authority to reliquidate an entry after liquidation within the same 90-day period. Thus, under the Customs laws, a liquidation becomes final and binding on all parties after expiration of that 90-day period.

Under 19 U.S.C. 1520(c)(1), Customs, notwithstanding the finality of liquidation concept, is authorized to reliquidate an entry within one year of the date of liquidation to correct a mistake of fact, clerical error, or other inadvertence in the entry or liquidation. An importer seeking reliquidation under the statute must file a petition with evidence establishing the mistake, error, or inadvertence.

Customs has implemented a 314-day liquidation cycle, under which the liquidation of an entry typically occurs (approximately) 314 days after the date of entry. In order to allow importers to make amendments to entry summaries already filed but not yet liquidated, Customs implemented a process by which importers could submit letters for that purpose. These letters are called Supplementary Information Letters (SILs) and usually result, upon liquidation, in a refund of duties, taxes, and/or fees deposited or a bill for additional duties, taxes, and/or fees owed (if these amounts were not submitted with the letter). The SIL policy (for ABI users, see Administrative Message 97-0727, dated August 3, 1997; for non-ABI users contact the local port office), though effective initially, has produced an increased paperwork and manpower burden for both importers and Customs.

To address these problems and other concerns, Customs is announcing this test of the post entry amendment procedure. The test procedure, which may eventually replace the SIL policy, allows importers to continue to make amendments to already filed entry summaries prior to liquidation, and it reduces the workload on importers and Customs by providing for quarterly reporting of some amendments. This quarterly tracking report frees importers from the task of immediately filing a SIL upon each discovery of an error and frees Customs from dealing with these errors as they are reported on a daily or weekly basis. Under the test, some errors must be reported upon discovery and are thus not eligible for inclusion in a quarterly report.

(Customs notes that errors in entry summaries, depending on the circumstances, may be the result of simple mistake or culpable negligence, gross negligence, or even fraud. For purposes of this test, the term "error" will be used generically, without distinguishing between these concepts. (*See* however the "Misconduct" section which holds that all test participants are subject to the usual array of penalties, liquidated damages, etc., while participating in the test.))

Administrative Exemption and Errors of More Than $20

Under 19 U.S.C. 1321(a)(1), Customs is authorized to disregard a minimal difference between the amount of duties, taxes, and fees deposited at entry and that amount (plus interest if applicable) actu-

ally found to be due (at liquidation). This is one of several statutory administrative exemptions. Section 159.6 of the Customs Regulations (19 CFR 159.6), which implements 19 U.S.C. 1321(a)(1), provides that Customs will disregard a difference in these (deposited and actual due) amounts of less than $20. Entry summaries processed under the test that evidence revenue differences of less than $20 will be reported on a quarterly basis rather than an individual basis. Differences of $20 or more will continue to be reported to Customs upon discovery.

THE POST ENTRY AMENDMENT PROCEDURE GENERALLY

Customs recognizes that, in some circumstances, the 314-day liquidation cycle presents a problematic or undesirable suspension of time between the filing of the entry summary and the liquidation. While that suspension of time serves a beneficial purpose in most cases, an importer that discovers an error in the entry summary during that period may want or need to resolve that error sooner rather than later. The SIL policy has been shown to be less and less effective in handling the volume of pre-liquidation corrections sought by importers.

Like the SIL policy, the post entry amendment test procedure will allow importers to amend entry summaries prior to liquidation. Unlike the SIL policy, the test procedure allows importers to report certain amendments on a quarterly basis, a feature that provides convenience and saves time and resources. Thus, a post entry amendment is reported in one of two ways: (1) through the filing of an individual amendment letter upon discovery of the error or (2) through the quarterly tracking report.

Both revenue related and non-revenue related errors may be reported through the test procedure. Revenue related errors are those that affect the amount of duties, taxes, and or fees applicable to an entry of merchandise. They involve two types: (1) those of $20 or more and (2) those of less than $20. Non-revenue related errors are those that do not affect the amount of applicable duties, taxes, and or fees due; they pertain rather to errors in the information that must be provided in the entry summary, such as country of origin, quantity of the merchandise, and tariff number under the Harmonized Tariff Schedule of the United States (HTSUS). Non-revenue related errors also involve two types: (1) those errors that must be reported to the Bureau of the Census (Census Bureau) under applicable law and Census Bureau rules and (2) those errors that need not be reported to the Census Bureau. (Guidelines for distinguishing between these kinds of errors are set forth under "The Test Program" section immediately below.)

THE TEST PROGRAM

Participation in the test is voluntary. There are no application procedures or eligibility requirements. To participate in the test, an importer need only follow the procedures set forth below to amend entry summaries (not informal entries) prior to liquidation. Under

the test, all amendments must be reported through either an individual amendment letter or a quarterly tracking report, depending on the circumstances. The alternative to these procedures is to continue to file individual SILs for each correction or wait until the entry liquidates (typically about 314 days after the date of entry) to file a protest under 19 U.S.C. 1514 and Part 174 of the Customs Regulations (19 CFR Part 174) or, if appropriate, a petition for reliquidation under 19 U.S.C. 1520(c)(1). It is also noted that, if appropriate under the circumstances, the prior disclosure procedure under 19 U.S.C. 1592(c)(4) (and 19 CFR 162.74) is available to both participants in the test and non-participants. Under the SIL policy, all letters must be submitted immediately upon discovery of the error regardless of the amount of the under or overpayment.

The Filing Requirement

Under the test, whether filing an individual amendment letter or a quarterly tracking report, test participants must explain the errors and submit corrections of them for Customs evaluation. An individual amendment letter must be filed for: (1) revenue related errors in the entry summary that result in either an overpayment or underpayment of duties, taxes, and or fees of $20 or more, or any amount relative to antidumping or countervailing duties, and (2) non-revenue related statistical information errors that must be reported to the Census Bureau. The quarterly tracking report must be used to report: (1) revenue related errors that result in either an overpayment or underpayment of duties, taxes, and or fees of less than $20 and (2) non-revenue related statistical information errors that need not be reported to the Census Bureau.

When one entry summary exhibits two or more errors but only one of them meets the requirements for filing an individual amendment letter, the test participant must file an individual amendment letter that covers all the errors, including those that alone would require reporting on a quarterly tracking report.

A post entry amendment filed through an individual amendment letter, as required under the test, will contain a cover sheet obtained from a Customs database designed for that purpose, three copies of the letter describing the nature of the amendment (including the entry summaries and the error(s) involved) and setting forth the corrections, and any additional documentation needed to support the amendment, if appropriate. Each individual letter will be date- and time-stamped upon filing with Customs. (Whether the test participant (or its broker) or Customs personnel will perform this function will be determined by local port policy.)

An individual amendment letter can be filed at any time prior to liquidation of the one or more entries it covers (but promptly after discovery of the error). Customs will accept individual amendment letters that are filed after liquidation but will treat them as protests under 19 U.S.C. 1514 or, if appropriate, as evidence warranting

reliquidation under 19 U.S.C. 1501.

A post entry amendment filed through the quarterly tracking report, as required under the test, will require the following information for each correction being reported: record number, entry number, filer, port, importer number, reason code (designating the reason for the change; codes are found in the Customs database), reason description, narrative description, duty difference, tax difference, fee difference, interest (if appropriate), input date, report date, and report type. This information must be submitted through the Customs database. The report must be filed within 15 calendar days from the last day of the quarter. The quarters are as follows: January 1 - March 31; April 1 - June 30; July 1 to September 30; and October 1 - December 31. Each report should cover all errors (other than those required to be reported on an individual amendment letter) discovered during that quarter unless the liquidation of the entry summaries containing those errors has become final. (Customs emphasizes that participants must file the first quarterly tracking report under the test within 15 days of March 31, 2001.)

Again, if an entry covered in an individual amendment letter or a quarterly tracking report has been liquidated, the filing (of that letter or report) relative to that entry summary will be treated under 19 U.S.C. 1514 (protest) or 1501 (reliquidation), as appropriate.

Revenue Related Errors

Revenue related errors of $20 or more:

For revenue related errors of $20 or more, or any dollar amount relative to antidumping or countervailing duty errors, test participants must file an individual amendment letter with Customs upon discovery of the error. Upon evaluation of an individual amendment letter, Customs will determine whether it agrees or disagrees with the amendment. If Customs agrees with the amendment, it will unset the liquidation cycle and issue a "change liquidation." In that instance, Customs will issue either a refund or a bill in the amount it determines to be owed. If the participant tenders with the letter the correct amount of duties, taxes, fees, and/or interest due, Customs will not issue a bill. If Customs disagrees, determining that there is no error, it will unset the liquidation cycle and issue a "no change" liquidation without issuance of a refund or a bill. If Customs determines that there is another error, other than the one (or those) reported, it will liquidate accordingly. If the participant disagrees with Customs liquidation decision, it may file a protest under 19 U.S.C. 1514 or, if appropriate, a petition for reliquidation under 19 U.S.C. 1520(c)(1).

Revenue related errors of less than $20:

Revenue related errors of less than $20 (except those relative to antidumping or countervailing duties, in which case an individual

amendment letter is required) must be reported on a quarterly tracking report filed with Customs. Upon evaluation of a quarterly tracking report, Customs will determine whether the amendments are accurate but will not unset the liquidation cycle. Customs will exercise its administrative exemption authority and disregard duties, taxes, and/or fees found owing in an amount of less than $20. The amendments may be taken into account when Customs, in due course, liquidates the reported entries. If the test participant disagrees with the liquidation, it may file a protest under 19 U.S.C. 1514 or, if appropriate, a petition for reliquidation under 19 U.S.C 1520(c).

Guidelines for processing revenue related errors:

a) Under $20/underpayment of duties, taxes, and or fees:
   - Importer files quarterly tracking report.
   - Customs does not unset liquidation cycle and issues a "no change" liquidation in due course.
   - Upon liquidation, Customs disregards underpayments of less than $20 per entry summary.

b) Under $20/overpayment of duties, taxes, and or fees:
   - Importer files quarterly tracking report.
   - Customs does not unset liquidation cycle and issues a "no change" liquidation in due course.
   - After liquidation, importer may protest or petition for reliquidation.

c) $20 or more/underpayment of duties, taxes, and or fees:
   - Importer files individual amendment letter with or without additional duties, taxes, fees, and interest (if applicable) owed.
   - Customs unsets liquidation cycle and liquidates accordingly.
   - Customs issues bill for payment if necessary.
   - After liquidation, importer may protest or petition for reliquidation.

d) $20 or more/overpayment of duties, taxes, and or fees:
   - Importer files individual amendment letter.
   - Customs unsets liquidation cycle and liquidates accordingly.
   - Customs issues refund.
   - After liquidation, importer may protest or petition for reliquidation.

Non-Revenue Related Errors

Statistical information errors:

The General Statistical Notes of the HTSUS (19 U.S.C. 1202) require importers to provide certain information in entry summaries, including the country of origin of the entered merchandise, a description of that merchandise, its quantity, any quota visa number, the HTSUS number, the value of the merchandise, and other charges and information regarding the merchandise (*see also* 19 CFR 141.61(e)). After receipt from the importer, this information is submitted by Cus-

toms to the Census Bureau where it is maintained as a source of national import data. Non-revenue related errors are those involving this required statistical information.

Whether a test participant must file an individual amendment letter or a quarterly tracking report for statistical information errors depends on whether the Census Bureau, under its rules, requires the reporting of the corresponding corrections. Under those rules, errors in required statistical information that exceed a certain level must be reported and errors that fall below that level are not reported.

For statistical information errors that must be reported to the Census Bureau, the test participant must file an individual amendment letter. If Customs agrees with the letter, it will unset the liquidation cycle and issue a "change liquidation," correcting the erroneous information. If Customs disagrees, concluding that there has not been an error, it will issue a "no change" liquidation. After liquidation, the test participant may file a protest under 19 U.S.C. 1514 or, if appropriate, a petition requesting reliquidation under 19 U.S.C. 1520(c). For errors that do not require reporting to the Census Bureau, the test participant must file a quarterly tracking report. Customs will evaluate the report but not unset the liquidation cycle, whether or not it agrees that there has been error. After liquidation in due course, the participant may file a protest or a petition requesting reliquidation.

Guidelines for determining when statistical information errors require the filing of an individual letter or a quarterly tracking report:

These guidelines show, for each of four categories of merchandise, that a post entry amendment concerning statistical information errors that meet (and exceed) Census Bureau statistical reporting levels must be filed through an individual amendment letter and that a post entry amendment concerning statistical information errors that do not meet those levels must be filed through a quarterly tracking report. The statistical levels are also set forth.

a) *Quota merchandise:*

(i) Statistical information errors that meet Census Bureau levels and require the filing of a post entry amendment through an individual amendment letter:

(A) Any error in the country of origin of the merchandise, net quantity of the merchandise, visa number, and HTSUS number;

(B) A value error when the difference between the entered and correct values is $10,000 or more; and

(C) An error relative to other charges (freight, insurance, and all other costs and expenses incurred in bringing the merchandise from the port of export to the U.S. port (see General Statistical Note (a)(xiv), HTSUS)) when the difference between the entered and correct values is $10,000 or more.

(ii) Statistical information errors that do not meet Census Bureau levels and require the filing of a post entry amendment through

a quarterly tracking report:

(A) A value error when the difference between the entered and correct values is less than $10,000; and

(B) An error relative to other charges (freight, etc.) when the difference between the entered and correct values is less than $10,000.

b) *Non-quota textile merchandise of Chapters 50 through 65, HTSUS, that is subject to a textile category number:*

(i) All statistical information errors (country of origin, quantity, HTSUS number, value, other charges (freight, etc.)) relative to this category of merchandise meet Census Bureau levels and require the filing of a post entry amendment through an individual amendment letter when the entered value of the merchandise is $3,000 or more.

(ii) All statistical information errors relative to this category of merchandise do not meet Census Bureau levels and require the filing of a post entry amendment through a quarterly tracking report when the entered value of the merchandise is less than $3,000.

c) *Merchandise subject to a Voluntary Restraint Agreement:*

(i) Statistical information errors that meet Census Bureau levels and require the filing of a post entry amendment through an individual amendment letter:

(A) Any error in country of origin, quantity of merchandise, and visa or HTSUS numbers;

(B) A value error when the difference between the entered and correct values is $10,000 or more; and

(C) An error relative to other charges (freight, etc.) when the difference between the entered and correct values is $10,000 or more.

(ii) Statistical information errors that do not meet Census Bureau levels and require the filing of a post entry amendment through a quarterly tracking report:

(A) A value error when the difference between the entered and correct values is less than $10,000; and

(B) An error relative to other charges (freight, etc.) when the difference between the entered and correct values is less than $10,000.

d) *All other merchandise:*

(i) Statistical information errors that meet Census Bureau levels and require the filing of a post entry amendment through an individual letter:

(A) An error in the country of origin when the entered value for the line item is $10,000 or more;

(B) An error in the net quantity of the merchandise when the difference between the entered and correct quantities is at least

10% and the entered value for the line item is $10,000 or more;

(C) A value error when the difference between the entered and the correct values is $10,000 or more;

(D) An error in the HTSUS number when the entered value for the line item is $10,000 or more;

(E) An error relative to other charges (freight, etc.) when the difference between the entered and correct values is $10,000 or more; and

(F) Any concentration of multiple entry summaries with erroneous reportable data when the accumulated total value involved is substantial but those entry summaries individually do not meet Census Bureau levels. (This reflects a Census Bureau requirement to make corrections to each entry summary included in the concentration of multiple entry summaries that meet the above description when the volume of entry summaries is substantial and the value level of each entry summary is also substantial but less than the required level. For example, a concentration of multiple entry summaries evidencing a country of origin error when the volume of those entry summaries is substantial and the per line item value for each entry summary is also substantial though less than $10,000 (the ordinarily required level). For guidance on the meaning of "substantial" in these contexts, contact the local Customs port office.)

(ii) Statistical information errors that do not meet Census Bureau levels and require the filing of a post entry amendment through a quarterly tracking report:

(A) An error in the country of origin when the entered value for the line item is less than $10,000;

(B) An error in the net quantity of the merchandise when the difference between the entered and correct quantities is less than 10 percent or the entered value for the line item is less than $10,000;

(C) A value error when the difference between the entered and correct values is less than $10,000;

(D) An error in the HTSUS number when the entered value for the line item is less than $10,000;

(E) An error relative to other charges (freight, etc) when the difference between the entered and correct values of the merchandise is less than $10,000.

Guidelines for processing non-revenue related statistical information errors:

a) Statistical information error requiring report to Census Bureau:

· Importer files individual amendment letter.
· Customs unsets liquidation cycle and issues a "change liquidation".
· After liquidation, importer may file a protest or petition.

b) Statistical information error not requiring report to Census Bureau:

· Importer files quarterly tracking report.

- Customs does not unset liquidation cycle and issues a "no change" liquidation in due course.
- After liquidation, importer may file a protest or petition.

Importers who voluntarily participate in the test commit, by such participation, to report all errors through the test procedure by filing either individual amendment letters or quarterly tracking reports (as appropriate under the above procedures) for the duration of the test. Customs emphasizes that the test applies only to the described procedure for reporting entry summary errors prior to liquidation. The test procedure has no effect on Customs enforcement authority or on other statutory or regulatory provisions and requirements relating to admissibility, restricted or prohibited merchandise, other agency requirements, etc. It is noted that even during the test, the administrative exemption under which Customs disregards ordinary underpayments of up to $20, does not apply to antidumping and countervailing duties.

AUTHORIZATION FOR THE TEST

Pursuant to Customs Modernization provisions in the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2170 (December 8, 1993), Customs amended its regulations (19 CFR chapter I), in part, to enable the Commissioner of Customs to conduct limited test programs or procedures designed to evaluate the effectiveness of new technology or operations procedures which have as their goal the more efficient and effective processing of passengers, carriers, and merchandise. Section 101.9(a) of the Customs Regulations (19 CFR 101.9(a)) allows for general testing for this purpose. *See* T.D. 95-21. This test is established pursuant to that regulatory provision.

MISCONDUCT

The test is open to all importers who elect to follow the procedures set forth in this document for correcting already filed entry summaries prior to liquidation. However, a participant making and amending entries under the test procedures will be subject to the usual penalties, liquidated damages, and other administrative sanctions for any Customs law violations.

EVALUATION OF THE TEST

Although by no means exclusive, the following evaluation factors may be used by Customs to assess the merits of the test procedure:

1. Workload impact;
2. Policy and procedure accommodations;
3. System efficiency;
4. Operational efficiency; or

5. Other issues raised by public comment or by the test participants.

Results of the test will be formulated at the conclusion of the test and will be made available to the public upon request. The test may be extended if warranted. Additional information on the post entry amendment procedure can be found under "Importing and Exporting" at http:// www.customs.gov.

Dated: November 22, 2000.

JOHN H. HEINRICH,
Acting Assistant Commissioner,
Office of Field Operations.

[Published in the **Federal Register** November 28, 2000 (65 FR 70872)]

EXTENSION OF GENERAL PROGRAM TEST: QUOTA PREPROCESSING

AGENCY: Customs Service, Treasury.

ACTION: General notice.

SUMMARY: This notice announces that the testing period for the quota preprocessing program, which allows for the electronic processing of quota-class apparel merchandise, is being extended through the year 2002. The test is being extended at the ports where quota preprocessing is currently being tested, but not being expanded to other ports at this time because of programming changes that have yet to be made to the Automated Commercial System. When the programming changes are completed, Customs will expand the program to all ports. Public comments concerning any aspect of the test are solicited.

DATES: The test is extended from January 1, 2001, until December 31, 2002, with evaluations of the test occurring periodically. Applications to participate in the test and comments concerning the test will continue to be accepted throughout the testing period.

ADDRESSES: Written comments regarding this notice or any aspect of this test should be addressed to Lori Bowers, U.S. Customs Service, QWG Team Leader, 1000 Second Ave., Suite 2100, Seattle, WA 98104-1020 or may be sent via e-mail to Lori.Bowers@customs.treas.gov. Applications should be sent to the prototype coordinator at any of the four following port(s) where the applicant wishes to submit quota entries for preprocessing:

1) Nancy Petagna, Port of Los Angeles, 300 S. Ferry St., Terminal Island, CA 90731;

2) Tony Piscitelli, Los Angeles International Airport, 11099 S. La Cienaga Blvd., Los Angeles, CA 90045;
3) Barry Goldberg, JFK Airport, JFK Building 77, Jamaica, NY 11430; and
4) John Lava, Ports of New York/Newark, 6 World Trade Center, New York, NY10048.

FOR FURTHER INFORMATION CONTACT: Lori Bowers (206)553-0452 or Cynthia Porter (202)927-5399.

SUPPLEMENTARY INFORMATION:

On July 24, 1998, Customs published a general notice in the **Federal Register** (63 FR 39929) announcing the limited testing, pursuant to the provisions of ' 101.9(a) of the Customs Regulations (19 CFR 101.9(a)), of a new operational procedure regarding the electronic processing of quota-class apparel merchandise. The new procedure was designed to allow certain quota entries (merchandise classifiable in chapters 61 and 62 of the Harmonized Tariff Schedule of the United States (HTSUS)) to be processed prior to carrier arrival, thus, reducing the quota processing time. The test was to be conducted at only four ports located in New York/Newark and Los Angeles and was to commence no earlier than August 24, 1998, and run for approximately six months. The notice informed the public of the new procedure and eligibility requirements for participation in the test, and solicited comments concerning any aspect of the test. The initial testing of the quota preprocessing program did not begin until September 15, 1998. The six-month time period of the original test expired on March 14, 1999.

On March 25, 1999, Customs published a general notice in the **Federal Register** (64 FR 14499) announcing that the testing period for the quota preprocessing program was being extended through the remainder of 1999. The testing was extended so that Customs could further evaluate the program's effectiveness and determine whether the program should be expanded to other ports. Again, the notice informed the public of the eligibility requirements for participation in the test, and solicited comments concerning any aspect of the test.

On January 6, 2000, Customs published another general notice in the **Federal Register** (65 FR 806) announcing that the testing period for the quota preprocessing program was being extended through the year 2000. The testing was extended at the ports where the test was already underway, but not expanded to other ports, so that programming changes could be made to the Automated Commercial System (ACS) which would have an impact on the expansion. At that time, the changes were scheduled to begin in March of 2000.

For budgetary reasons, the ACS programming changes could not be made as scheduled. Thus, the testing of the quota preprocessing program must continue until Customs can evaluate the electronic feasibility of expanding the program to all ports.

Accordingly, this document announces that Customs is extending

the test of the quota preprocessing prototype at the ports where testing is already underway until the end of 2002. Those ports are: the port of Los Angeles (Port code: 2704); the port of New York/Newark (Port codes: 1001/4601); JFK Airport (Port code: 4701); and Los Angeles International Airport (Port code: 2720). Anyone interested in participating in the test should refer to the test notice published in the July 24, 1998 **Federal Register** for eligibility and application information. Any expansion of the parameters of the test will be the subject of a future **Federal Register** notice.

Dated: November 27, 2000.

BONNI G. TISCHLER,
Assistant Commissioner,
Office of Field Operations.

[Published in the **Federal Register** November 30, 2000 (65 FR 71356)]

U.S. Customs Service

November 29, 2000

Department of the Treasury
Office of the Commissioner of Customs
Washington, D.C.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

U.S. Customs Service

General Notice

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO THE CLASSIFICATION OF A "COLLAR BANDANA"

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of a tariff classification ruling and revocation of treatment relating to the classification of a "Collar Bandana".

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling letter relating to the tariff classification of a "Collar Bandana" under the Harmonized Tariff Schedule of the United States (HTSUS), and revoking any treatment previously accorded by the Customs Service to substantially identical merchandise. Notice of the proposed revocation was published in the CUSTOMS BULLETIN of October 18, 2000, Vol. 34. No. 41 & 42. No comments were received.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after February 11, 2001.

FOR FURTHER INFORMATION CONTACT: Ann Segura Minardi, Textile Branch, at (202) 927-2380.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub.L. 103-182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to pro-

vide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. section 1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

In New York Ruling (NY) 816981, Customs ruled that a "Collar Bandana" consisting of a woven cotton fabric with a nylon lining and hook and loop closure was properly classified in subeading 6217.10.9030, HTSUS, which provides for "Other made up clothing accessories; parts of garments or of clothing accessories other than those of heading 6212: Accessories: Other, of man-made fibers." Since the issuance of this ruling, Customs reviewed the classification of these items and determined that the cited ruling is in error. We have determined that this item is classifiable in subheading 6307.90.9989, HTSUS, which is the provision for "Other made up articles, including dress patterns: Other: Other: Other: Other: Other".

We recognize that Headquarters Ruling (HQ) 958942, dated April 7, 1997, determined that NY 816981 improperly classified the subject item as a "clothing accessory" under subheading 6217.19.9030, HTSUSA, and indicated that NY 816981 would be modified to reflect the correct classification. Although the intent to modify NY 816981 was clearly expressed in HQ 958942, the formal requirements contained in 19 U.S.C. 1625(c)(1), were not satisfied and modification of NY 816981 was not effectuated at that time.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is now revoking NY 816981 dated January 2, 1996, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 960568 (see "Attachment " to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical merchandise.

As stated in the proposed notice, this revocation will cover any rulings on this issue which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchan-

dise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Dated: November 28, 2000.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

November 28, 2000
CLA-2 RR:CR:TE 960568 ASM
Category: Classification
Tariff No. 6307.90.9989

MR. STEPHEN M. ZELMAN
STEPHEN M. ZELMAN & ASSOCIATES
888 7th Avenue, Suite 4500
New York, N.Y. 10106

Re: Revocation of NY 816981; classification of a "Collar Bandana".

DEAR MR. ZELMAN:

This is in regard to NY 816981 issued to your client Sportsmed International, Inc., on January 2, 1996, which involved the tariff classification ruling of a product identified as a "Collar Bandana". We have reviewed this ruling and determined that the classification provided for this merchandise is incorrect. This ruling revokes NY 816981 by providing the correct classification for the subject product.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed revocation of NY 816981 was published on October 18, 2000, in the CUSTOMS BULLETIN, Volume 34, Number 41 & 42. No comments were received.

Facts:

The subject goods, identified as a "Collar Bandana", consists of a bandana which is rectangular in shape with rounded ends. The bandana measures approximately 2 and ¾ inches by 11 and ½ inches. The bandana is constructed with an exterior of woven cotton, lined with woven 65 percent polyester and 35 percent cotton and has pocket-like openings and a "Velcro" closure which is designed to contain "heat packs." The heat packs are imported separately and contain a chemical mixture,

packaged in an airtight envelope. Upon opening, the chemical mixture within the bags reacts with oxygen to generate heat. Printed information on the bandana's packaging indicates it is to be used as a carrier for the heat packs. The bandana is intended to be worn around the neck, one size fits all, and fits loosely around the neck. Upon importation into the United States, the bandanas are always packaged together with the heat packs. The bandanas are never sold separately.

NY 816981, dated January 2, 1996, classified the "Collar Bandana", which was imported by itself, in subheading 6217.10.9030, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), as "Other made up clothing accessories; parts of garments or of clothing accessories other than those of heading 6212: Accessories: Other, of man-made fibers."

In HQ 958942, dated April 7, 1997, Customs found the subject goods classifiable under subheading 6307.90.9989, HTSUSA, which provides for "Other made up articles, including dress patterns: Other: Other: Other: Other: Other". In this ruling, it was determined that the article had been designed to act as a carrier of replaceable chemical packs which in turn, provide warmth to the wearer. Since HQ 958942 was never published in the CUSTOMS BULLETIN by way of a General Notice, the formal requirements contained in 19 U.S.C. 1625(c)(1) were not satisfied and revocation of NY 816981 was not effectuated at that time. Thus, this ruling serves to formally revoke NY 816981 pursuant to 19 U.S.C. 1625(c)(1).

Issue:

What is the proper classification for the merchandise?

Law and Analysis:

Classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRI may then be applied. The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI. The EN, although not dispositive, are used to determine the proper interpretation of the HTSUSA by providing a commentary on the scope of each heading of the HTSUSA. *See*, T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The bandana fits loosely around the neck, and is neither decorative nor fashionable. If worn alone, it would not provide sufficient warmth to the wearer. In HQ 958942, it was determined that the product in question did not function as an accessory because it failed to provide protection or decoration to the wearer when worn alone. Furthermore, the bandana had been designed and marketed for use as a carrier and is intended to be used exclusively with the heat packs (imported separately) and packaged with the bandana upon importation into the U.S. Thus, HQ 958942, dated April 7, 1997, is the basis for the proposed revocation of NY 816981, dated January 2, 1996.

Holding:

NY 816981, dated January 2, 1996, is hereby revoked.

The subject merchandise is correctly classified in subeading 6307.90.9989, HTSUSA, which provides for "Other made up articles, including dress patterns: Other: Other: Other: Other: Other". The general column one duty rate is 7 percent *ad valorem*.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most

current information available, we suggest that your client check, close to the time of shipment, the *Status on Current Import Quotas (Restraint Levels)*, an issuance of the U.S. Customs Service, which is updated weekly and is available at the local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories applicable to textile merchandise, your client should contact the local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

JOHN E. ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

---

19 CFR PART 177

PROPOSED MODIFICATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF ELECTRICAL LIGHT AND LIGHT SCULPTURE ARTICLES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of four ruling letters and revocation of treatment relating to the classification of electrical light and light sculpture articles.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify four ruling letters relating to the classification of electrical light and light sculpture articles under the Harmonized Tariff Schedule of the United States (HTSUS), and to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before January 12, 2001.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue. N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address during regular business hours.

FOR FURTHER INFORMATION CONTACT: Teresa Frazier, Commercial Rulings Division (202) 927-2511.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility".** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to modify four ruling letters relating to the classification of electrical light and light sculpture articles. Although in this notice Customs is specifically referring to four rulings (New York Ruling Letters (*NYRL*)) NY C89096 dated July 7, 1998; NY C89018 dated June 30, 1998; NY C88503 dated June 25, 1998; and NY C88297 dated June 17, 1988, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the ones identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Sched-

ule of the United States (HTSUS). Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to this notice.

In New York Ruling Letter (NYRL) C89096 dated July 7, 1998, Customs ruled that a "10 Spooky Eye Light Set" was classifiable in subheading 9405.30.00, HTSUS, which provides for lighting sets of a kind used for Christmas trees. Further, in NYRL C89018 dated June 30, 1998, Customs ruled that a "Happy Halloween 15 Light Set" was classifiable in subheading 9405.30.00, HTSUS. Likewise, in NYRL C88503 dated June 25, 1998, Customs ruled that "Halloween Pumpkin 10 Light Set" was classifiable in subheading 9405.30.00, HTSUS. Finally, in NYRL C88297 dated June 17, 1988, orange, green and purple light sets, referred to as "Halloween Light Sets", were classifiable in 9405.30.00, HTSUS. Since the issuance of these rulings, Customs has reviewed the classification of these articles and has determined that the cited rulings are in error. Accordingly, we are modifying NYRL C89096, C89018, C88503 and C88297 as we believe these articles are classifiable in subheading 9405.40.80, HTSUS, which provides for other electric lamps and lighting fittings, other than of base metal.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to modify NYRL C89096, NYRL C89018, NYRL C88503 and NYRL C88297 (*see* "Attachments A-D") and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in HQ 964457, HQ 964458, HQ 964459, and HQ 964460 respectively (*see* "Attachments E-H" to this document).

Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

Dated: November 22, 2000.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

July 7, 1998
CLA-2-94:RR:NC:2:227 C89096
Category: Classification
Tariff No. 9405.30.00

MR. DOUGLAS J. WYATT
WALGREENS COMPANY
200 Wilmot Road
Deerfield, IL 60015

Re: The tariff classification of electric light sets from China.

DEAR MR. WYATT:

In your letter dated June 9, 1998, you requested a tariff classification ruling.

The sample submitted is known as the 10 Spooky Eye Light Set, item number 896707, which consists of an electrical wire harness with 10 sockets, 10 miniature light bulbs and 10 removable black plastic coverings with neon reflectors that resemble spooky eyes. It has been determined that the subject novelty light set is "of a kind" used for a Christmas tree.

The applicable subheading for the 10 Spooky Eye Light Set will be 9405.30.00, Harmonized Tariff Schedule of the United States (HTS), which provides for lighting sets of a kind used for Christmas trees. The rate of duty will be 8 percent *ad valorem*.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist George Kalkines at 212-466-5794.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

June 30, 1998
CLA-2-94:RR:NC:2:227 C89018
Category: Classification
Tariff No. 9405.30.00

MR. DOUGLAS J. WYATT
WALGREENS COMPANY
200 Wilmot Road
Deerfield, IL 60015

Re: The tariff classification of electric light sets from China.

DEAR MR. WYATT:

In your letter dated June 9, 1998, you requested a tariff classification ruling.

The sample submitted is known as the Happy Halloween 15 Light Set, item number 896711, which consists of an electrical wire harness with 15 sockets, 15

miniature light bulbs and 15 removable plastic orange covers. The combination of these covers display the wording Happy Halloween and the figure of a jack o' lantern. It has been determined that the subject novelty light set is "of a kind" used for a Christmas tree.

The applicable subheading for the Happy Halloween light set will be 9405.30.00, Harmonized Tariff Schedule of the United States (HTS), which provides for lighting sets of a kind used for Christmas trees. The rate of duty will be 8 percent *ad valorem*.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist George Kalkines at 212-466-5794.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT C]

June 25, 1998
CLA-2-94:RR:NC:2:227 C88503
Category: Classification
Tariff No. 9405.30.00

MR. DOUGLAS J. WYATT
WALGREENS COMPANY
200 Wilmot Road
Deerfield, IL 60015

Re: The tariff classification of Christmas tree light sets from China.

DEAR MR. WYATT:

In your letter dated May 29, 1998, you requested a tariff classification ruling.

The sample submitted is known as the Halloween Pumpkin 10 Light Set, item number 877809, which consists of an electrical wire harness with 10 sockets, 10 miniature light bulbs and 10 removable plastic covers in the shape of jack o' lantern pumpkins. It is stated that there is 12 inches of space between each cover. It has been determined that the subject novelty light set is "of a kind" used for a Christmas tree.

The applicable subheading for this Christmas tree light set will be 9405.30.00, Harmonized Tariff Schedule of the United States (HTS), which provides for lighting sets of a kind used for Christmas trees. The rate of duty will be 8 percent *ad valorem*.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist George Kalkines at 212-466-5794.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT D]

June 17, 1998
CLA-2-94:RR:NC:2:227 C88297
Category: Classification
Tariff No. 9405.30.00

MR. DOUGLAS J. WYATT
WALGREENS COMPANY
200 Wilmot Road
Deerfield, IL 60015

Re: The tariff classification of Christmas tree light sets from China.

DEAR MR. WYATT:

In your letter dated May 15, 1998, you requested a tariff classification ruling.

The samples submitted consist of three Christmas tree lighting sets, item numbers 896702, 896703 and 896704 with orange, green and purple bulbs respectively. Each set possesses an electrical wire harness with 50 sockets and 50 miniature light bulbs. It is to be noted that although the subject merchandise is referred to as the "Halloween Light Sets," they are considered to be of the same class or kind of sets that are designed for utilization on Christmas trees.

The applicable subheading for these Christmas tree light sets will be 9405.30.00, Harmonized Tariff Schedule of the United States (HTS), which provides for lighting sets of a kind used for Christmas trees. The rate of duty will be 8 percent *ad valorem*.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist George Kalkines at 212-466-5794.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT E]

CLA-2 RR:CR:GC 964457 TF
Category: Classification
Tariff No. 9405.40.80

MARIANNE ROWDEN
KATTEN MUCHIN ZAVIS, P.A.
525 West Monroe Street
Chicago, IL 60661

Re: Reconsideration of NYRL C89096.

DEAR MS. ROWDEN:

This is in regard to your letter of August 17, 2000, on behalf of Walgreens Co., in which you requested reconsideration of NYRL C89096, dated July 7, 1998, regarding the classification of a "10 Spooky Eye Light Set", under the Harmonized Tariff

Schedule of the United States (HTSUS). Photos of the subject merchandise were submitted.

In NYRL C89096, this article was determined to be classifiable in subheading 9405.30.00, HTSUS, which provides for lighting sets of a kind used for Christmas trees.

We have reviewed NYRL C89096 and determined that the classification provided for this merchandise is incorrect. This ruling sets forth the correct classification of these articles.

Facts:

The article under consideration is a "10 Spooky Eye Light Set" (item#896707), which is made of an electrical wire harness composed of 10 sockets, 10 miniature light bulbs, and 10 removable black plastic, neon reflective coverings which resemble "spooky" eyes.

Issue:

Whether the "10 Spooky Eye Light Set" is classifiable in subheading 9405.40.80, HTSUS, which provides for other electric lamps and lighting fittings, other than of base metal, or as lighting sets of a kind for Christmas trees in subheading 9405.30.00, HTSUS.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1, HTSUS, provides that classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, HTSUS, and if the headings or notes do not require otherwise, the remaining GRIs 2 through 6, HTSUS, may be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitutes the official interpretation of the HTSUS. The ENs, although not dispositive, are used to determine the proper interpretation of the HTSUS by providing a commentary on the scope of each heading of the HTSUS. *See* T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS headings and legal notes under consideration are as follows:

Chapter 94, Note 1(l)	This chapter does not cover: (l)Toy furniture or toy lamps or lighting fittings (heading 9503), billiard tables or other furniture specially constructed for games (heading 9504), furniture for magic tricks or decorations (other than electric garlands) such as Chinese lanterns (heading 9505).
9405	Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included:
9405.30.00	Lighting sets of a kind used for Christmas trees

9405.40	Other electric lamps and lighting fittings:
9405.40.80	Other
* * *	
Chapter 95, Note 1(t)	This chapter does not cover electric garlands of all kinds (heading 9405).

* * * * *

In the instant case, you rely on two principle arguments for classifying the "10 Spooky Eye Light Set" article within subheading 9405.40.80, HTSUS.

First, you argue that subheading 9405.40.80 is the appropriate heading for classifying the articles because Chapter 95, note 1(t) precludes electric garlands from being classified as festive articles.

Webster's 3rd New International Dictionary of the English Language (unabridged) (1993) defines a garland as "a wreath or festoon of leaves or flowers to be worn on the head or used to decorate an object". *Id.* at 936. An article is an electric garland if it is able to be hung or displayed and is composed of lights which are powered by an electrical source attached by a power cord to a battery or plug. *See also* HQ 952832, dated February 19, 1993, (describing a "Holiday Carousel" electric music garland).

The ENs to heading 9405 provides, in pertinent part, for the following:

> (1)Lamps and lighting fittings normally used for the illumination of rooms, *e.g.*: hanging lamps; bowl lamps; ceiling lamps; chandeliers; wall lamps; standard lamps; table lamps; bedside lamps; desk lamps; night lamps; water-tight lamps.
>
> (3)Specialized lamps, *e.g.*: darkroom lamps; machine lamps (presented separately); photographic studio lamps; inspection lamps (other than those of heading 85.12); non-flashing beacons for aerodromes; shop window lamps; **electric garlands** [*emphasis added*] (including those fitted with fancy lamps for carnival or entertainment purposes or for decorating Christmas trees).

We also note that EN 94.05(I)(3) states that heading 9405 provides, in pertinent part, for "electric garlands (including those fitted with fancy lamps for carnival or entertainment purposes or for decorating Christmas trees)". As the sample under consideration qualifies as an electric garland as defined above, the legal notes set forth direct classification in heading 9405 at GRI 1.

Second, you argue that the instant article is not used to decorate Christmas trees and refer to *Primal Lite, Inc. v. United States*, 15 F.Supp. 2d 915 (Ct. Int'l Trade 1999), *aff'd* 182 F.3d 1362 (CAFC 1998). In that case, the Court of Appeals for the Federal Circuit (CAFC) noted that as subheading 9405.30.00 is a "use" provision, an article's "use in connection with Christmas trees [must] be the predominant or principal use of those goods". *Id.* at 1362. We agree with you that the instant light set article is not used for Christmas trees. Therefore, we find the "10 Spooky Eye Light Set" article is classifiable within subheading 9405.40.80, HTSUS, which provides for other electric lamps and lighting fittings, other than of base metal.

Holding:

At GRI 1, the "10 Spooky Eye Light Set" article is classifiable in subheading 9405.40.80, HTSUS, which provides for other electric lamps and lighting fittings, other than of base metal.

NYRL C89096 is modified as set forth in this ruling.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT F]

CLA-2 RR:CR:GC 964458 TF
Category: Classification
Tariff No. 9405.40.80

MARIANNE ROWDEN
KATTEN MUCHIN ZAVIS, P.A.
525 West Monroe Street
Chicago, IL 60661

Re: Reconsideration of NYRL C89018.

DEAR MS. ROWDEN:

This is in regard to your letter of August 17, 2000, on behalf of Walgreens Co., in which you requested reconsideration of NYRL C89018, dated June 30, 1998, regarding the classification of a "Happy Halloween 15 Light Set", under the Harmonized Tariff Schedule of the United States (HTSUS). Photos of the subject merchandise were submitted.

In NYRL C89018, this article was determined to be classifiable in subheading 9405.30.00, HTSUS, which provides for lighting sets of a kind used for Christmas trees.

We have reviewed NYRL C89018 and determined that the classification provided for this merchandise is incorrect. This ruling sets forth the correct classification of this article.

Facts:

The article under consideration is a "Happy Halloween 15 Light Set" (item #896711) which is composed of an electrical wire harness comprised of 15 sockets, 15 miniature light bulbs, and 15 removable orange, plastic light covers. The combination of these covers display the greeting "Happy Halloween" and the figure of a jack o'lantern.

Issue:

Whether the "Happy Halloween 15 Light Set" is classifiable in subheading 9405.40.80, HTSUS, which provides for other electric lamps and lighting fittings, other than of base metal, or as lighting sets of a kind for Christmas trees in subheading 9405.30.00, HTSUS.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1, HTSUS, provides that classification shall be determined according to the

terms of the headings and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, HTSUS, and if the headings or notes do not require otherwise, the remaining GRIs 2 through 6, HTSUS, may be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitutes the official interpretation of the HTSUS. The ENs, although not dispositive, are used to determine the proper interpretation of the HTSUS by providing a commentary on the scope of each heading of the HTSUS. *See* T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS headings and legal notes under consideration are as follows:

Chapter 94, Note 1(l)	This chapter does not cover: (l)Toy furniture or toy lamps or lighting fittings (heading 9503), billiard tables or other furniture specially constructed for games (heading 9504), furniture for magic tricks or decorations (other than electric garlands) such as Chinese lanterns (heading 9505).
9405	Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included:
9405.30.00	Lighting sets of a kind used for Christmas trees
9405.40	Other electric lamps and lighting fittings:
9405.40.80	Other
* * *	
Chapter 95, Note 1(t)	This chapter does not cover electric garlands of all kinds (heading 9405).

* * * *

In the instant case, you raise two principle arguments for classifying the instant article, identified as a "Happy Halloween 15 Light Set", within subheading 9405.40.80, HTSUS.

First, you argue that subheading 9405.40.80 is the appropriate heading for classifying the articles as Chapter 95, note 1(t) precludes electric garlands from being classified as festive articles.

Webster's 3rd New International Dictionary of the English Language (unabridged) (1993) defines a garland as "a wreath or festoon of leaves or flowers to be worn on the head or used to decorate an object". *Id.* at 936. An article is an electric garland if it is able to be hung or displayed and is composed of lights which are powered by an electrical source attached by a power cord to a battery or plug. *See also* HQ

952832, dated February 19, 1993, (describing a "Holiday Carousel" electric music garland).

The ENs to heading 9405 provides, in pertinent part, as follows:

> (1)Lamps and lighting fittings normally used for the illumination of rooms, *e.g.*: hanging lamps; bowl lamps; ceiling lamps; chandeliers; wall lamps; standard lamps; table lamps; bedside lamps; desk lamps; night lamps; water-tight lamps.
>
> (3)Specialized lamps, *e.g.*: darkroom lamps; machine lamps (presented separately); photographic studio lamps; inspection lamps (other than those of heading 85.12); non-flashing beacons for aerodromes; shop window lamps; **electric garlands** [*emphasis added*] (including those fitted with fancy lamps for carnival or entertainment purposes or for decorating Christmas trees).

We also note that EN 94.05(I)(3) states that heading 9405 provides, in pertinent part, for "electric garlands (including those fitted with fancy lamps for carnival or entertainment purposes or for decorating Christmas trees)". As the sample under consideration qualifies as an electric garland as defined above, the legal notes set forth direct classification in heading 9405 at GRI 1.

Second, you argue that the instant article is not used to decorate Christmas trees and refer to *Primal Lite, Inc. v. United States*, 15 F.Supp. 2d 915 (Ct. Int'l Trade 1999), *aff'd* 182 F.3d 1362 (CAFC 1998). In that case, the Court of Appeals for the Federal Circuit (CAFC) noted that as subheading 9405.30.00 is a use provision, an article's "use in connection with Christmas trees [must] be the predominant or principal use of those goods". *Id.* at 1362.

We agree with you that the instant article is not for Christmas trees as we note the Halloween motif design and display of the "Happy Halloween" greeting. Thus, subheading 9405.30.00 is out of contention and the merchandise is classifiable within subheading 9405.40.80, HTSUS, which provides for other electric lamps and lighting fittings, other than of base metal.

Holding:

At GRI 1, the "Happy Halloween 15 Light Set" is classifiable in subheading 9405.40.80, HTSUS, which provides for other electric lamps and lighting fittings, other than of base metal.

NYRL C89018 is modified as set forth in this ruling.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT G]

CLA-2 RR:CR:GC 964459 TF
Category: Classification
Tariff No. 9405.40.80

MARIANNE ROWDEN
KATTEN MUCHIN ZAVIS, P.A.
525 West Monroe Street
Chicago, IL 60661

Re: Reconsideration of NYRL C88503.

DEAR MS. ROWDEN:

This is in regard to your letter of August 17, 2000, on behalf of Walgreens Co., in which you requested reconsideration of NYRL C88503, dated June 25, 1998, regarding the classification of a "Halloween Pumpkin 10 Light Set", under the Harmonized Tariff Schedule of the United States (HTSUS). Photos of the subject merchandise were submitted.

In NYRL C88503, this article was determined to be classifiable in subheading 9405.30.00, HTSUS, which provides for lighting sets of a kind used for Christmas trees.

We have reviewed NYRL C88503 and determined that the classification provided for this merchandise is incorrect. This ruling sets forth the correct classification of this article.

Facts:

The article under consideration is a "Halloween Pumpkin 10 Light Set" (item #877809), which consists of an electrical wire harness composed of 10 sockets and 10 miniature light bulbs, each which are spaced 12" apart and connectable with up to three other light sets. The packaging indicates that the article is capable of steady burn or flashing and is suitable for indoor or outdoor use.

Issue:

Whether the "Halloween Pumpkin 10 Light Set" is classifiable in subheading 9405.40.80, HTSUS, which provides for other electric lamps and lighting fittings, other than of base metal, or as lighting sets of a kind for Christmas trees in subheading 9405.30.00, HTSUS.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1, HTSUS, provides that classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, HTSUS, and if the headings or notes do not require otherwise, the remaining GRIs 2 through 6, HTSUS, may be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitutes the official interpretation of the HTSUS. The ENs, although not dispositive, are used to determine the proper interpretation of the HTSUS by providing a commentary on the scope of each heading of the HTSUS. *See* T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS headings and legal notes under consideration are as follows:

Chapter 94, Note 1(l)	This chapter does not cover: (l)Toy furniture or toy lamps or lighting fittings (heading 9503), billiard tables or other furniture

	specially constructed for games (heading 9504), furniture for magic tricks or decorations (other than electric garlands) such as Chinese lanterns (heading 9505).
9405	Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included:
9405.30.00	Lighting sets of a kind used for Christmas trees
9405.40	Other electric lamps and lighting fittings:
9405.40.80	Other
* * *	
Chapter 95, Note 1(t)	This chapter does not cover electric garlands of all kinds (heading 9405).

* * * *

In the instant case, you rely on two principle arguments as to classifying the instant subject article, identified a "Halloween Pumpkin 10 Light Set", within subheading 9405.40.80, HTSUS.

First, you argue that subheading 9405.40.80 is the appropriate heading for classifying the merchandise as Chapter 95, note 1(t) precludes electric garlands from being classified as festive articles.

Webster's 3rd New International Dictionary of the English Language (unabridged) (1993) defines a garland as "a wreath or festoon of leaves or flowers to be worn on the head or used to decorate an object". *Id.* at 936. An article is an electric garland if it is able to be hung or displayed and is composed of lights which are powered by an electrical source attached by a power cord to a battery or plug. *See also* HQ 952832, dated February 19, 1993, (describing a "Holiday Carousel" electric music garland).

The ENs to heading 9405 provides, in pertinent part, for the following:

> (1)Lamps and lighting fittings normally used for the illumination of rooms, *e.g.*: hanging lamps; bowl lamps; ceiling lamps; chandeliers; wall lamps; standard lamps; table lamps; bedside lamps; desk lamps; night lamps; water-tight lamps.
>
> (3)Specialized lamps, *e.g.*: darkroom lamps; machine lamps (presented separately); photographic studio lamps; inspection lamps (other than those of heading 85.12); non-flashing beacons for aerodromes; shop window lamps; **electric garlands**

[*emphasis added*] (including those fitted with fancy lamps for carnival or entertainment purposes or for decorating Christmas trees).

We also note that EN 94.05(I)(3) states that heading 9405 provides, in pertinent part, for "electric garlands (including those fitted with fancy lamps for carnival or entertainment purposes or for decorating Christmas trees)". As the sample under consideration qualifies as an electric garland as defined above, the legal notes set forth direct classification in heading 9405 at GRI 1.

In your second argument, you contend that the subject merchandise is not used to decorate Christmas trees and refer to *Primal Lite, Inc. v. United States*, 15 F.Supp. 2d 915 (Ct. Int'l Trade 1999), *aff'd* 182 F.3d 1362 (CAFC 1998). In that case, the Court of Appeals for the Federal Circuit (CAFC) noted that as subheading 9405.30.00 is a "use" provision, an article's "use in connection with Christmas trees [must] be the predominant or principal use of those goods". *Id.* at 1362.

We agree with the you that the instant light set article is not used for Christmas trees as their solid orange color combined with their pumpkin motif design is associated more with Halloween than with the Christmas holiday. Therefore, subheading 9405.30, HTSUS is out of contention and the "Halloween Pumpkin 10 Light Set" is classifiable within subheading 9405.40.80, HTSUS, which provides for other electric lamps and lighting fittings, other than of base metal.

Holding:

At GRI 1, the "Halloween Pumpkin 10 Light Set" is classifiable in subheading 9405.40.80, HTSUS, which provides for other electric lamps and lighting fittings, other than of base metal.

NYRL C88503 is modified as set forth in this ruling.

JOHN DURANT,
Director,
Commercial Rulings Division.

[ATTACHMENT H]

CLA-2 RR:CR:GC 964460 TF
Category: Classification
Tariff No. 9405.30.00; 9405.40.80

MARIANNE ROWDEN
KATTEN MUCHIN ZAVIS, P.A.
525 West Monroe Street
Chicago, IL 60661

Re: Reconsideration of NYRL C88297.

DEAR MS. ROWDEN:

This is in regard to your letter of August 24, 2000, on behalf of Walgreens Co., in which you requested reconsideration of NYRL C88297, dated June 17, 1998, regarding the classification of three styles of electric lighting sets, under the Harmonized Tariff Schedule of the United States (HTSUS). Photos of the subject merchandise were submitted.

In NYRL C88297, this article was determined to be classifiable in subheading 9405.30.00, HTSUS, which provides for lighting sets of a kind used for Christmas trees.

We have reviewed NYRL C88297 and determined that the classification provided for two of the three articles is incorrect. This ruling sets forth the correct classification of these articles.

Facts:

The articles under consideration consist of three styles of electric light sets, identified as "Halloween Light Sets", items #896702, 896703 and 896704, which are comprised of orange, green and purple bulbs, respectively. Each set consists of an electrical wire harness composed of 50 sockets and 50 miniature light bulbs that are packaged in a Halloween designed box.

Issue:

Whether the three styles of Halloween light sets are classifiable in subheading 9405.40.80, HTSUS, which provides for other electric lamps and lighting fittings, other than of base metal, or as lighting sets of a kind for Christmas trees in subheading 9405.30.00, HTSUS.

Law and Analysis:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1, HTSUS, provides that classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, HTSUS, and if the headings or notes do not require otherwise, the remaining GRIs 2 through 6, HTSUS, may be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitutes the official interpretation of the HTSUS. The ENs, although not dispositive, are used to determine the proper interpretation of the HTSUS by providing a commentary on the scope of each heading of the HTSUS. *See* T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS headings and legal notes under consideration are as follows:

Chapter 94, Note 1(l)	This chapter does not cover: (l)Toy furniture or toy lamps or lighting fittings (heading 9503), billiard tables or other furniture specially constructed for games (heading 9504), furniture for magic tricks or decorations (other than electric garlands) such as Chinese lanterns (heading 9505).
9405	Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included:
9405.30.00	Lighting sets of a kind used for Christmas trees
9405.40	Other electric lamps and lighting fittings:

9405.40.80		Other
*	*	*
Chapter 95, Note 1(t)		This chapter does not cover electric garlands of all kinds (heading 9405).

* * * *

In the instant case, you rely on two principle arguments as to classifying the instant subject articles, identified as "Halloween Light Sets", within subheading 9405.40.80, HTSUS.

First, you argue that subheading 9405.40.80 is the appropriate heading for classifying the articles because Chapter 95, note 1(t) precludes electric garlands from being classified as festive articles.

Webster's 3rd New International Dictionary of the English Language (unabridged) (1993) defines a garland as "a wreath or festoon of leaves or flowers to be worn on the head or used to decorate an object". *Id.* at 936. An article is an electric garland if it is able to be hung or displayed and is composed of lights which are powered by an electrical source attached by a power cord to a battery or plug. *See also* HQ 952832, dated February 19, 1993, (describing a "Holiday Carousel" electric music garland).

The ENs to heading 9405 provides, in pertinent part, as follows:

> (1)Lamps and lighting fittings normally used for the illumination of rooms, *e.g.*: hanging lamps; bowl lamps; ceiling lamps; chandeliers; wall lamps; standard lamps; table lamps; bedside lamps; desk lamps; night lamps; water-tight lamps.
>
> (3)Specialized lamps, *e.g.*: darkroom lamps; machine lamps (presented separately); photographic studio lamps; inspection lamps (other than those of heading 85.12); non-flashing beacons for aerodromes; shop window lamps; **electric garlands** [*emphasis added*] (including those fitted with fancy lamps for carnival or entertainment purposes or for decorating Christmas trees).

We also note that EN 94.05(I)(3) states that heading 9405 provides, in pertinent part, for "electric garlands (including those fitted with fancy lamps for carnival or entertainment purposes or for decorating Christmas trees)". As the samples under consideration qualify as electric garlands as defined above, the legal notes set forth direct classification in heading 9405 at GRI 1.

In your second argument, you contend that the instant articles are not used to decorate Christmas trees and refer to *Primal Lite, Inc. v. United States*, 15 F.Supp. 2d 915 (Ct. Int'l Trade 1999), *aff'd* 182 F.3d 1362 (CAFC 1998), in that case, the Court of Appeals for the Federal Circuit (CAFC) indicated that as subheading 9405.30.00 is a "use" provision, an article's "use in connection with Christmas trees [must] be the predominant or principal use of those goods". *Id.* at 1362.

Principal use can be defined as an article's use which exceeds any other single use. *See* HQ 083885, dated July 18, 1989. You must demonstrate that the subject light sets are not principally used for Christmas trees.

In the instant case, we do not find the string of solid orange and string of solid purple lights to be used on Christmas trees, as their colors are more associated with Halloween rather than with the Christmas holiday. These two articles (items 896702 and 896704), are classifiable within subheading 9405.40.80, HTSUS, which

provides for other electric lamps and lighting fittings, other than of base metal.

With respect to the green lights (item 896703), we received a photo of this article which shows the packaging and labeling of the instant green lights as "Halloween Lights". However, we do not believe this is sufficient to establish that their principle use is other than as of a kind used for Christmas trees. Further, the light's green color is traditionally associated with the Christmas holiday rather than Halloween. *See* HQ 087160, dated August 22, 1990. It is uncommon to use green garlands during Halloween as the predominant colors of this holiday are orange and black. As a result, we find the instant green light set's principal use as of a kind for Christmas trees to exceed any other use. Thus, they remain classifiable within subheading 9405.30.00, HTSUS, which provides for "lighting sets of a kind used for Christmas trees".

Holding:

At GRI 1, the orange and purple light sets are classifiable in subheading 9405.40.80, HTSUS, which provides for other electric lamps and lighting fittings, other than of base metal.

At GRI 1, the green lights set remains classifiable in subheading 9405.30.00, HTSUS, which provides for lighting sets of a kind for Christmas trees.

NYRL C88297 is modified as set forth in this ruling.

JOHN DURANT,
Director,
Commercial Rulings Division.

United States Court of International Trade

One Federal Plaza
New York, N.Y. 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Richard W. Goldberg
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa Ann Ridgway
Richard K. Eaton

Senior Judges

James L. Watson
Hebert N. Maletz
Nicholas Tsoucalas
R. Kenton Musgrave

Clerk

Leo M. Gordon

Decisions of the United States Court of International Trade

(Slip Op. 00-153)

SKF USA INC. AND SKF SVERIGE AB, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND THE TORRINGTON COMPANY, DEFENDANT-INTERVENOR

Court No. 97-11-02008

(Dated November 17, 2000)

JUDGEMENT

TSOUCALAS, *Judge*: This court having received and reviewed the United States Department of commerce, International Trade Administration's ("Commerce") Final Results of Redetermination Pursuant to Court remand, *SKF USA Inc. v. United States*, 24 CIT __, Slip Op. 00-58 (June 1, 2000) ("Remand Results"), and Commerce having complied with the Court's remand and no responses to the Remand results having be submitted by the parties, it is hereby

ORDERED that the Remand Results filed by Commerce on August 23, 2000 are affirmed in their entirety; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

(Slip Op. 00-154)

FAG ITALIA, S.P.A., FAG BEARINGS CORP., SKF USA INC. AND SKF INDUSTRIE S.P.A., PLAINTIFFS AND DEFENDANT-INTERVENORS *v.* UNITED STATES, DEFENDANT, AND THE TORRINGTON COMPANY, DEFENDANT-INTERVENOR AND PLAINTIFF

Consol. Court No. 97-02-00260-S

Plaintiffs and defendant-intervenors, FAG Italia, S.p.A., FAG Bearings Corp. (collectively "FAG"), SKF USA Inc. and SKF Industrie S.p.A. (collectively "SKF") move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the United States Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews* ("*Final Results*"), 62 Fed. Reg. 2081 (Jan. 15, 1997), as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, and Singapore; Amended Final Results of Antidumping Duty Administrative Reviews*, 62 Fed. Reg. 14,391 (Mar. 26, 1997). Defendant-intervenor and plaintiff, The Torrington Company ("Torrington") also moves pursuant to USCIT R. 56.2 for judgment upon the agency record challenging certain aspects of Commerce's *Final Results*.

Specifically, FAG argues that Commerce erred in: (1) calculating constructed value ("CV") profit; (2) failing to match United States sales to similar home market sales prior to resorting to CV when all home market sales of identical merchandise have been disregarded; (3) including FAG's zero-value United States transactions in its margin calculations; (4) excluding amounts for imputed credit and inventory carrying expenses in its calculation of total expenses for the constructed export price ("CEP") profit ratio; and (5) making an unlawful circumstances of sale ("COS") adjustment to its normal value ("NV") for certain advertising expenses.

SKF contends that Commerce erred in: (1) calculating CV profit; (2) calculating the CV home market credit expense rate based on home market gross unit price while applying that rate to the per unit cost of production; (3) including SKF's zero-value United States transactions in its margin calculations; and (4) failing to match United States sales to similar home market sales prior to resorting to CV when all home market sales of identical merchandise have been disregarded.

Torrington contends that Commerce erred in committing various computer programming errors that resulted in its failure to convert some of SKF's adjustments from foreign currency to United States dollars.

Held: FAG's USCIT R. 56.2 motion is denied in part and granted in part. SKF's USCIT R. 56.2 motion is denied in part and granted in part. Torrington's USCIT R. 56.2 motion is granted. The case is remanded to Commerce to: (1) first attempt to match FAG and SKF's United States sales to similar home market sales before resorting to CV; (2) exclude any transactions that were not supported by consideration from FAG and SKF's United States sales databases and to adjust the dumping margins accordingly; (3) include all expenses included in "total United States expenses" in the calculation of "total expenses" for FAG's CEP profit ratio; (4) remove the COS adjustment for certain advertising expenses from FAG's NV; (5) reconsider its decision to calculate SKF's home market credit expense rate based upon price and then apply that rate to cost; (6) examine the programming language for converting certain adjustments that SKF Italy reported on export prices for sales made through the foreign trade zone and through Sweden from foreign currency into United States dollars and to make appropriate corrections.

[FAG's motion is denied in part and granted in part. SKF's motion is denied in part and granted in part. Torrington's motion is granted. Case remanded.]

(Dated November 21, 2000)

Grunfeld, Desiderio, Lebowitz & Silverman LLP (*Max F. Schutzman, Andrew B. Schroth* and *Mark E. Pardo*) for FAG.

Steptoe & Johnson LLP (*Herbert C. Shelley* and *Alice A. Kipel*) for SKF.

David W. Ogden, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Velta A. Melnbrencis*, Assistant Director); of counsel: *Mark A. Barnett, Rina Goldenberg* and *David R. Mason*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendant.

Stewart and Stewart (*Terence P. Stewart, Wesley K. Caine, Geert De Prest* and *Lane S. Hurewitz*) for Torrington.

OPINION

TSOUCALAS, *Senior Judge*: Plaintiffs and defendant-intervenors, FAG Italia, S.p.A., FAG Bearings Corp. (collectively "FAG"), SKF USA Inc. and SKF Industrie S.p.A. (collectively "SKF") move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the United States Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews* ("*Final Results*"), 62 Fed. Reg. 2081 (Jan. 15, 1997), as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, and Singapore; Amended Final Results of Antidumping Duty Administrative Reviews* ("*Amended Final Results*"), 62 Fed. Reg. 14,391 (Mar. 26, 1997). Defendant-intervenor and plaintiff, The Torrington Company ("Torrington") also moves pursuant to USCIT R. 56.2 for judgment upon the agency record challenging certain aspects of Commerce's *Final Results*.

Specifically, FAG argues that Commerce erred in: (1) calculating constructed value ("CV") profit; (2) failing to match United States sales to similar home market sales prior to resorting to CV when all home market sales of identical merchandise have been disregarded; (3) including FAG's zero-value United States transactions in its margin calculations; (4) excluding amounts for imputed credit and inventory carrying expenses in its calculation of total expenses for the constructed export price ("CEP") profit ratio; and (5) making an unlawful circumstances of sale ("COS") adjustment to its normal value ("NV") for certain advertising expenses.

SKF contends that Commerce erred in: (1) calculating CV profit; (2) calculating the CV home market credit expense rate based on home market gross unit price while applying that rate to the per unit cost of production; (3) including SKF's zero-value United States transactions in its margin calculations; and (4) failing to match United States sales to similar home market sales prior to resorting to CV when all home market sales of identical merchandise have been disregarded.

Torrington contends that Commerce erred in committing various

computer programming errors that resulted in its failure to convert some of SKF's adjustments from foreign currency to United States dollars.

BACKGROUND

This case concerns the sixth review of the antidumping duty order on antifriction bearings (other than tapered roller bearings) and parts thereof ("AFBs") imported to the United States from France during the review period of May 1, 1994 through April 30, 1995. On July 8, 1996, Commerce published the preliminary results of the subject review. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Thailand and the United Kingdom; Preliminary Results of Antidumping Duty Administrative Reviews, Termination of Administrative Reviews, and Partial Termination of Administrative Reviews* ("*Preliminary Results*"), 61 Fed. Reg. 35,713. Commerce issued the *Final Result*s on January 15, 1997, *see* 62 Fed. Reg. 2081, and the *Amended Final Results* on March 26, 1997, *see* 62 Fed. Reg. 14,391.

Since the administrative review at issue was initiated after December 31, 1994, the applicable law is the antidumping statute as amended by the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809 (1994) (effective January 1, 1995). *See Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995) (citing URAA § 291(a)(2), (b) (noting effective date of URAA amendments)).

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a) (1994) and 28 U.S.C. § 1581(c) (1994).

STANDARD OF REVIEW

The Court will uphold Commerce's final determination in an antidumping administrative review unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994); *see NTN Bearing Corp. of America v. United States*, 24 CIT ___, ___, 104 F. Supp. 2d 110, 115-16 (2000) (detailing Court's standard of review in antidumping proceedings).

DISCUSSION

I. *Commerce's CV Profit Calculation*

A. *Background*

For this POR, Commerce used CV as the basis for NV "when there were no usable sales of the foreign like product in the comparison market." *Preliminary Results*, 61 Fed. Reg. at 35,718. Commerce calculated the profit component of CV using the statutorily preferred methodology of 19 U.S.C. § 1677b(e)(2)(A) (1994). *See Final Results*, 62 Fed. Reg. at 2113. Specifically, in calculating CV, the statutorily preferred method is to calculate an amount for profit based on "the

actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review . . . in connection with the production and sale of a foreign like product [made] in the ordinary course of trade, for consumption in the foreign country." 19 U.S.C. § 1677b(e)(2)(A).

In applying the preferred methodology for calculating CV profit, Commerce determined that "the use of aggregate data that encompasses all foreign like products under consideration for NV represents a reasonable interpretation of [§ 1677b(e)(2)(A)] and results in a practical measure of profit that [Commerce] can apply consistently in each case." *Final Results*, 62 Fed. Reg at 2113. Also, in calculating CV profit under § 1677b(e)(2)(A), Commerce excluded below-cost sales from the calculation which it disregarded in the determination of NV pursuant to § 1677b(b)(1) (1994). *See id.* at 2114.

B. *Contentions of the Parties*

FAG and SKF contend that Commerce's use of aggregate data encompassing all foreign like products under consideration for NV in calculating CV profit is contrary to § 1677b(e)(2)(A). *See* FAG's Br. Supp. Mot. J. Agency R. ("FAG's Br.") at 5-11; SKF's Br. Supp. Mot. J. Agency R. ("SKF's Br.") at 9-24. Instead, FAG and SKF claim that Commerce should have relied on alternative methodologies such as the one described by § 1677b(e)(2)(B)(i), which provides a CV profit calculation that is similar to the one Commerce used, but does not limit the calculation to sales made in the ordinary course of trade, that is, below-cost sales are not excluded from the calculation. *See* FAG's Br. at 10-11; SKF's Br. at 24-25. SKF also asserts that if Commerce's exclusion of below-cost sales from the numerator of the CV profit calculation is lawful, Commerce should nonetheless include such sales in the denominator of the calculation to temper bias which is inherent in the agency's dumping margin calculations. *See* SKF's Br. at 25-28.

Commerce responds that it properly calculated CV profit pursuant to § 1677b(e)(2)(A), based on aggregate profit data of all foreign like products under consideration for NV. *See* Def.'s Mem. in Partial Opp'n to Pls.' Mots. J. Agency R. ("Def.'s Mem.") at 9-25. Consequently, Commerce maintains that since it properly calculated CV profit under subparagraph (A) rather than (B) of § 1677b(e)(2), it correctly excluded below-cost sales from the CV profit calculation. *See id.* at 11-13. Torrington generally agrees with Commerce's contentions. *See* Torrington's Resp. to Pls.' Mots. J. Agency R. ("Torrington's Resp.") at 7-15.

C. *Analysis*

In *RHP Bearings Ltd. v. United States*, 23 CIT ___, 83 F. Supp. 2d 1322 (1999), this Court upheld Commerce's CV profit methodology of using aggregate data of all foreign like products under consideration for NV as being consistent with the antidumping statute. *See id.* at ___, 83 F. Supp. 2d at 1336. Since Commerce's CV profit methodology

and FAG and SKF's arguments at issue in this case are practically identical to those presented in *RHP Bearings*, the Court adheres to its reasoning in *RHP Bearings*. The Court, therefore, finds that Commerce's CV profit methodology is in accordance with law.

Moreover, since (1) § 1677b(e)(2)(A) requires Commerce to use the actual amount for profit in connection with the production and sale of a foreign like product in the ordinary course of trade, and (2) 19 U.S.C. § 1677(15) (1994) provides that below-cost sales disregarded under § 1677b(b)(1) are considered to be outside the ordinary course of trade, the Court finds that Commerce properly excluded below-cost sales from the CV profit calculation.

II. *Commerce's Matching United States Sales to Similar Home Market Sales Prior to Resorting to CV*

FAG and SKF maintain that Commerce erred in resorting to CV without first attempting to match United States sales, that is, export price ("EP") or CEP sales, to similar home market sales in instances where home market sales of identical merchandise have been disregarded because they were out of the ordinary course of trade. *See* FAG's Br. at 12; SKF's Br. at 36-37. FAG and SKF maintain that a remand is necessary to bring Commerce's practice in line with the United States Court of Appeals for the Federal Circuit's ("CAFC") decision in *Cemex, S.A. v. United States*, 133 F.3d 897, 904 (Fed. Cir. 1998). Commerce agrees with FAG and SKF. *See* Def.'s Mem. at 26.

The Court agrees with FAG, SKF and Commerce. In *Cemex*, the CAFC reversed Commerce's practice of matching a United States sale to CV when the identical or most similar home market model failed the cost test. *See* 133 F.3d at 904. The CAFC stated that "[t]he plain language of the statute requires Commerce to base foreign market value [(now NV)] on nonidentical but similar merchandise [(foreign like product under the amendments to the URAA)] . . . rather than [CV] when sales of identical merchandise have been found to be outside the ordinary course of trade." *Id*. In light of *Cemex*, this matter is remanded so that Commerce can first attempt to match United States sales to similar home market sales before resorting to CV.

III. *Zero-Value United States Transactions*

FAG and SKF argue that in light of *NSK Ltd. v. United States*, 115 F.3d 965, 975 (Fed. Cir. 1997), the Court should remand the matter to Commerce to exclude their zero-value transactions from their margin calculations. *See* FAG's Br. at 12-13; SKF's Br. at 34-36. FAG and SKF maintain that United States transactions at zero value, such as prototypes and samples, do not constitute true sales and, therefore, should be excluded from the margin calculations pursuant to *NSK*. *See id*. The identical issue was decided by this Court in *SKF USA Inc. v. United States*, 23 CIT ___, Slip Op. 99-56, 1999 WL 486537 (June 29, 1999).

Torrington concedes that a remand may be necessary in light of

NSK, but argues that further factual inquiry by Commerce is necessary to determine whether the zero-price transactions were truly without consideration. *See* Torrington's Resp. at 17-20. Torrington argues that only if the transactions are truly without consideration can they fall within *NSK*'s exclusion. *See id.*

Commerce concedes that the case should be remanded to it to exclude the sample transactions for which FAG and SKF received no consideration from their United States sales databases. *See* Def.'s Mem. at 26-27.

Commerce is required to impose antidumping duties upon merchandise that "is being, or is likely to be, sold in the United States at less than its fair value." 19 U.S.C. § 1673(1) (1994). A zero-priced transaction does not qualify as a "sale" and, therefore, by definition cannot be included in Commerce's NV calculation. *See NSK*, 115 F.3d at 975 (holding "that the term 'sold' . . . requires both a transfer of ownership to an unrelated party and consideration."). Thus, the distribution of AFBs for no consideration falls outside the purview of 19 U.S.C. § 1673. Consequently, the Court remands to Commerce to exclude any transactions that were not supported by consideration from SKF's United States sales database and to adjust the dumping margins accordingly.

IV. *Commerce's Treatment of FAG's Imputed Credit and Inventory Carrying Costs in the Calculation of CEP Profit*

A. *Background*

In calculating CEP, Commerce must reduce the starting price used to establish CEP by "the profit allocated to the expenses described in paragraphs (1) and (2)" of § 1677a(d) (1994). 19 U.S.C. § 1677a(d)(3) (1994). Under 19 U.S.C. § 1677a(f), the "profit" that will be deducted from this starting price will be "determined by multiplying the total actual profit by [a] percentage" calculated "by dividing the total United States expenses by the total expenses." *Id.* at § 1677a(f)(1), (2)(A). Section 1677a(f)(2)(B) defines "total United States expenses" as the total expenses deducted under § 1677a(d)(1) and (2), that is, commissions, direct and indirect selling expenses, assumptions and the cost of any further manufacture or assembly in the United States.

Section 1677a(f)(2)(C) establishes a tripartite hierarchy of methods for calculating "total expenses." First, "total expenses" will be "[t]he expenses incurred with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country" if Commerce requested such expenses for the purpose of determining NV and CEP. *Id.* § 1677a(f)(2)(C)(i). If category (i) does not apply, then "total expenses" will be "[t]he expenses incurred with respect to the narrowest category of merchandise sold in the United States and the exporting country which includes the subject merchandise." *Id.* § 1677a(f)(2)(C)(ii). If neither category (i) or (ii) applies, then "total expenses" will be "[t]he expenses incurred with respect to the narrowest category of merchandise sold in all countries

which includes the subject merchandise." *Id.* § 1677a(f)(2)(C)(iii). "Total actual profit" is based on whichever category of merchandise is used to calculate "total expenses" under § 1677a(f)(2)(C). *See id.* § 1677a(f)(2)(D).

FAG reported United States sales that Commerce treated as CEP sales pursuant to 19 U.S.C. § 1677a(b), and Commerce deducted an amount for profit allocated to the expenses enumerated by 19 U.S.C. § 1677a(d)(1) and (2). *See* 19 U.S.C. § 1677a(d)(3). In the profit calculation, Commerce excluded imputed expenses and carrying costs from the "total actual profit" calculation, defined in § 1677a(f)(2)(D), and from the "total expenses" calculation, defined in § 1677a(f)(2)(C), but included them in the "total United States expenses" calculation, defined in § 1677a(f)(2)(B). FAG objected to the omission of imputed expenses and carrying costs from "total expenses," and Commerce responded by stating the following:

> Sections [1677a(f)(1) and 1677a(f)(2)(D)] of the Tariff Act state that the per-unit profit amount shall be an amount determined by multiplying the total actual profit by the applicable percentage (ratio of total U.S. expenses to total expenses) and that the total actual profit means the total profit earned by the foreign producer, exporter, and affiliated parties. In accordance with the statute, we base the calculation of the total actual profit used in calculating the per-unit profit amount for CEP sales on actual revenues and expenses recognized by the company. In calculating the per-unit cost of the U.S. sales, we have included net interest expense. Therefore, we do not need to include imputed interest expenses in the "total actual profit" calculation since we have already accounted for actual interest in computing this amount under section [1677a(f)(1)].
>
> When we allocated a portion of the actual profit to each CEP sale, we have included imputed credit and inventory carrying costs as part of the total U.S. expense allocation factor. This methodology is consistent with section [1677a(f)(1)] of the statute which defines "total United States expense" as the total expenses described under section [1677a(d)(1) and (2)]. Such expenses include both imputed credit and inventory carrying costs.

Final Results, 62 Fed. Reg. at 2126-67.

B. *Contentions of the parties*

FAG complains that in calculating "total United States expenses" pursuant to 19 U.S.C. § 1677a(f)(2)(B), Commerce included amounts for imputed credit and inventory carrying expenses, but failed to include these amounts in its calculation of "total expenses," as defined by 19 U.S.C. § 1677a(f)(2)(C). *See* FAG's Br. at 13-15. FAG argues that the plain language of the statute demonstrates that "total United States expenses" is a subset of "total expenses" and, therefore, any

expense constituting "'total United States expenses' ([that is], expenses incurred in selling the subject merchandise in the United States)" must also be included in "'total expenses' ([that is], all expenses incurred in selling the subject merchandise in the United States and the foreign like product in the home market)." *Id.* at 14-15. FAG argues that Commerce should not be permitted to ignore the plain language of the statute. *See id.*

Commerce maintains that the statute does not address the use of imputed expenses in the calculation of "total expenses" or "total actual profit." *See* Def.'s Mem. at 30. Commerce considers imputed selling expenses, including imputed credit and inventory carrying costs, to be selling expenses encompassed by § 1677a (d)(1) and (2) and, as such, includes them in the calculation of "total United States expenses." *See id.* at 32. Commerce, however, did not include the imputed expenses in "total actual profit" because "'normal accounting principles permit the deduction of only actual booked expenses, not imputed expenses, in calculating profit.'" *Id.* at 34 (citation omitted). Additionally, Commerce did not include imputed expenses in "total actual profit" and "total expenses" because "the imputed expenses were properly accounted for through the inclusion of actual interest expenses in 'total actual profit' and 'total expenses.'" *Id.* at 33.

Commerce also maintains that it did not include imputed expenses in "total expenses" since Commerce is required to calculate "total actual profit" on the same basis as "total expenses" pursuant to 19 U.S.C. § 1677a(f)(2)(D). *See id.* at 34. Commerce argues that the provision for "total expenses" merely encompasses all expenses "'which are incurred by or on behalf of the foreign producer and foreign exporter with respect to the production and sale of such merchandise,'" and if Congress had intended "that Commerce utilize the same types of expenses for both 'total United States expenses' and 'total expenses,' it would have made that intent clear." *Id.* at 32-33 (quoting 19 U.S.C. § 1677a(f)(2)(C)). Torrington generally agrees with Commerce. *See* Torrington's Resp. at 20-23.

C. *Analysis*

In *SNR Roulements v. United States*, 24 CIT ___, ___, Slip Op. 00-131, 2000 WL 1562867, at *___ (October 13, 2000), this Court determined that "Commerce improperly excluded imputed inventory and carrying costs from 'total expenses' when it had included these expenses in 'total United States expenses'" because such action was contrary to the plain meaning of 19 U.S.C. § 1677a. This Court remanded the issue to Commerce, directing it to "include all expenses included in 'total United States expenses' in the calculation of 'total expenses.'" *Id.*

Since Commerce's methodology and FAG's arguments in this case are practically identical to those presented in *SNR Roulements*, the Court adheres to its reasoning in *SNR Roulements*. The Court, therefore, finds that Commerce's methodology was not in accordance with

law. The Court remands this issue to Commerce to include all expenses included in "total United States expenses" in the calculation of "total expenses."

V. *Commerce's Circumstances of Sale Adjustment for Certain Advertising Expenses*

A. *Background*

In response to section C of Commerce's questionnaire, FAG stated that all United States advertising expenses were not "specifically" related to the subject merchandise and, therefore, were properly classified as indirect selling expenses. FAG's Resp. Sec. C Questionnaire (Sept. 27, 1995) (Case No. A-475-801) at 43-44. FAG also stated that indirect selling expenses incurred in the country of manufacture included "printing costs associated with the publication of catalogs and technical data material in English," and reported these expenses as an element of its indirect selling expense calculation. *Id.* at 51.

During the administrative review, Torrington argued that the publication expenses reported in the indirect selling expense calculation should have been deducted from CEP. *See Final Results*, 62 Fed. Reg. at 2125. In the *Final Results*, Commerce stated the following with respect to Torrington's argument:

> Based on the record, we determined that the expenses in question are not deductible from CEP under [19 U.S.C. § 1677a(d)] . . . . However, the record suggests that . . . [the] printing costs associated with the publication of the catalogs and technical materials in English, is a direct advertising cost that FAG OH assumed on behalf of FAG Italy's U.S. affiliate for sales to its unaffiliated customers in the United States. The [Statement of Administrative Action] at 828, requires that [Commerce] make a [circumstances of sale] adjustment (rather than a CEP adjustment) for "assumptions of expenses incurred in the foreign country on sales to the affiliated importer."

Id. To account for the costs associated with publishing catalogs and technical manuals, Commerce made an upward adjustment to FAG's NV as a COS adjustment under 19 U.S.C. § 1677b(a)(6)(C)(iii). *See id.*

B. *Contentions of the Parties*

FAG maintains that the issue "is not whether a COS adjustmenct can properly be made for an indirect expense" since "[t]here is a wealth of precedent to the effect that COS adjustments are only used to offset direct selling expenses." FAG's Br. at 17. FAG identifies the crux of the issue as "whether the expenses related to the catalogs and technical manuals are direct or indirect." *Id.*

FAG states that direct advertising is defined as "advertising directed at the customer's customer, and indirect advertising has likewise always been defined as advertising directed at the initial customer." *Id.*

Because the catalogs and technical materials were directed at FAG's customers, FAG reported the expenses associated with them as indirect.

FAG maintains that nothing on the record supports Commerce's assertion in the *Final Results* that the advertising expenses are direct. To the contrary, FAG points to Commerce's treatment of the same publication expenses as indirect with respect to FAG's home market sales as evidence that similar expenses for its United States sales are indirect as well. *See* FAG's Br. at 18 (citing FAG's Resp. Sec. B Questionnaire (Sept. 27, 1995) (Case No. A-475-801) at 35-37). Accordingly, FAG asks the Court to remand this issue to Commerce to "clarify and elaborate on what facts on the record 'suggest' that FAG's expenses related to publishing catalogs and technical manuals are direct rather than indirect expenses," and if Commerce is unable to point to facts supporting its determination, the Court should instruct Commerce to remove the upward COS adjustment to FAG's NV. FAG's Br. at 19. FAG is opposed to any effort by Commerce to make an adjustment to CEP, arguing that the only issue before the Court is whether the COS adjustment to NV was proper. *See* FAG's Reply Supp. Mot. J. Agency R. ("FAG's Reply") at 14.

Commerce reviewed the record and the *Final Results* and concluded that "it did err in its treatment of these advertising expenses in the" *Final Results*. Def.'s Mem. at 37. Specifically, "Commerce agrees that the record does not support its decision to treat these advertising expenses as direct expenses" and believes that it should have treated them as "indirect expenses since the record indicates that the materials were published for FAG's customer, not the customer's customer." *Id.* (citing FAG United States Sales Verification Report (Apr. 18, 1996) (Case No. A-475-801) at 9). Commerce also believes that "because these expenses were associated with economic activity in the United States," they should have been deducted from CEP pursuant to 19 U.S.C. § 1677a(d)(1). *Id.*

Commerce also concedes that it erred in assuming, as facts available, that all of the indirect selling expenses reported by FAG were advertising expenses because of FAG's deficiencies in reporting. *See* Def.'s Mem. at 37. Commerce recognizes, however, that FAG did not provide proper information because it was reporting the advertising expense in accordance with Commerce's questionnaire instructions. *See id.* Commerce requests a remand to obtain information to segregate the advertising expenses from other expenses reported in the indirect selling expense field that are not associated with United States economic activities. *See id.* at 38.

C. *Analysis*

Section 1677a(d)(1) of Title 19 of the United States Code provides that expenses incurred in selling subject merchandise in the United States shall be deducted from CEP. Deductions for these expenses include both direct and indirect expenses "associated with economic activities occurring in the United States." Statement of Administra-

tive Action, H.R. Doc. 103-316, at 823 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040. Here, although the expenses associated with the publication of catalogs and technical materials in English were treated as having been borne by FAG's affiliates in Germany, they were actually related to advertising by FAG USA to its unaffiliated customers. *See* Def.'s Mem. at 36-37; FAG's Br. at 17; FAG United States Sales Verification Report (Apr. 18, 1996) (Case No. A-475-801) at 9 ("FAG focuses its advertising on distributors by publishing product catalogues."); FAG's Resp. Sec. C Questionnaire (Sept. 27, 1995) (Case No. A-475-801) at 51 ("costs incurred . . . in Germany to support the sale of these bearings to customers in the United States . . . [include] printing costs associated with the publication of catalogs and technical data material in English."). Thus, if the publication expenses are associated with economic activity in the United States, Commerce may deduct them from CEP pursuant to 19 U.S.C. § 1677a(d)(1).

Commerce chose not to make any adjustment to CEP for the publication expenses, stating in the *Final Results* that "based on the record, . . . the expenses in question are not deductible from CEP." 62 Fed. Reg. at 2125. Based on Commerce's assertion, FAG argues that it is "completely improper for [Commerce] to request a remand now to deduct these expenses from CEP when the record shows that such a deduction is entirely contrary to Commerce's administrative determination." FAG's Reply at 14. Additionally, Torrington argues that Commerce's COS adjustment was supported by substantial evidence because the expenses at issue qualified as "'assumptions of expenses incurred in the foreign country on sales to the affiliated importer'" within the meaning of 19 U.S.C. § 1677b(a)(6)(C)(iii), a position contrary to its position during the administrative review. Torrington's Resp. at 25; *Final Results*, 62 Fed. Reg. at 2125 ("Torrington contends that [Commerce] should make a deduction to CEP . . . .").

The Court disagrees with Torrington's argument that Commerce's decision to make a COS adjustment is supported by substantial evidence. Commerce's decision to make a COS adjustment was premised on its conclusion that the expenses were direct expenses, a conclusion that is not supported by the evidence on the record and that Commerce now repudiates. *See Final Results*, 62 Fed. Reg. at 2125 ("printing costs associated with the publication of catalogs and technical material in English[] is a direct advertising cost."). None of the parties point to any evidence that demonstrates that the publication expenses are direct; to the contrary, FAG points to evidence that tends to show the expenses are indirect. *See* FAG United States Sales Verification Report (Apr. 18, 1996) (Case No. A-475-801) at 9 ("FAG focuses its advertising on distributors by publishing product catalogues.").

Furthermore, the Court agrees with FAG's contention that Commerce is not permitted to make an adjustment to CEP. Commerce considered and rejected the possibility of making a CEP adjustment and cannot now reopen the record in order to make such a finding

upon finding that its COS adjustment is not supported by record evidence. Accordingly, the Court remands this issue to Commerce to remove the COS adjustment for the advertising expenses from FAG's NV.

VI. *CV Home Market Credit Expense Rate*

SKF contends that Commerce erred in "calculating a CV home market credit expense rate based on price, but applying that rate to cost." *See* SKF's Br. at 29. Specifically, SKF contends that Commerce "computed a credit expense rate based on the ratio of home market credit expense to home market gross unit price" when "calculating an average home market credit expense to be deducted from CV." *Id.* Commerce applied the home market credit expense rate to the COP, rather than price, of each model to derive a per unit amount for home market credit expense. *See id.* Commerce then deducted the per unit expense amount in the CV calculation. *See id.* SKF maintains that applying a home market credit expense rate based upon price to cost is contrary to the "fundamental principle inherent in all antidumping rate and factor calculations, that the calculation of the rate and its application must be consistent." SKF's Reply Supp. Mot. J. Agency R. at 20.

Commerce agrees that it erred "by calculating a home market credit expense rate based upon price but applying that rate to cost," and asks the Court to remand the matter for recalculation of SKF's home market credit cost. Def.'s Mem. at 38. Torrington, however, maintains that Commerce's methodology is reasonable and should be affirmed. *See* Torrington's Resp. at 34-36.

In light of the foregoing, the Court remands this issue to Commerce to reconsider its decision to calculate the home market credit expense rate based upon price and then apply that rate to cost.

VII. *Commerce's Computer Programming Errors*

Torrington alleges that Commerce made "various clerical or methodological errors in connection with certain sales reported by SKF Italy." Torrington's Mem. Supp. Mot. J. Agency R. ("Torrington's Mem.") at 2. Specifically, Torrington alleges that Commerce made errors in the computer "programming language for converting certain adjustments that SKF-Italy reported for export prices for sales made through a foreign trade zone and through Sweden from foreign currency into U.S. dollars." Torrington's Reply to Resps. of Def. & SKF ("Torrington's Reply") at 1-2.

Commerce "reviewed the programming language and agrees that it unintentionally did not convert the adjustments from foreign currency into U.S. dollars" and requests a remand to "examine the programming language and make appropriate corrections." Def.'s Mem. at 38-39.

SKF maintains that Commerce "is best situated to determine whether its computer program indeed embodies the clerical errors alleged by Torrington and whether a remand for correction of such alleged er-

rors is necessary or appropriate." SKF's Resp. to Torrington's Mem. at 3. If a remand is necessary, SKF suggests alternative programming language, which Torrington has agreed is accurate. *See id.* at 3; Torrington's Reply at 2-3.

In light of the foregoing, the Court remands this issue to Commerce to examine the programming language for converting certain adjustments that SKF Italy reported on export prices for sales made through the foreign trade zone and through Sweden from foreign currency into United States dollars and to make appropriate corrections.

CONCLUSION

The Court remands this case to Commerce to: (1) first attempt to match FAG and SKF's United States sales to similar home market sales before resorting to CV; (2) exclude any transactions that were not supported by consideration from FAG and SKF's United States sales databases and to adjust the dumping margins accordingly; (3) include all expenses included in "total United States expenses" in the calculation of "total expenses" for FAG's CEP profit ratio; (4) remove the COS adjustment for certain advertising expenses from FAG's NV; (5) reconsider its decision to calculate SKF's home market credit rate expense based upon price and then apply that rate to cost; (6) to examine the programming language for converting certain adjustments that SKF Italy reported on export prices for sales made through the foreign trade zone and through Sweden from foreign currency into United States dollars and to make appropriate corrections.

FAG ITALIA, S.P.A., FAG BEARINGS CORP., SKF USA INC. AND SKF INDUSTRIE S.P.A., PLAINTIFFS AND DEFENDANT-INTERVENORS *v.* UNITED STATES, DEFENDANT, AND THE TORRINGTON COMPANY, DEFENDANT-INTERVENOR AND PLAINTIFF

Consol. Court No. 97-02-00260-S

ORDER

This case having been duly submitted for decision and this Court, after due deliberation, having rendered a decision herein; now, in accordance with said decision, it is hereby

ORDERED that this case is remanded to the United States Department of Commerce, International Trade Administration ("Commerce"), to first attempt to match the United States sales of FAG Italia, S.p.A., FAG Bearings Corp. (collectively "FAG") and SKF USA Inc. and SKF Industrie S.p.A. (collectively "SKF") to similar home market sales before resorting to constructed value; and it is further

ORDERED that this case is remanded to Commerce to exclude any transactions that were not supported by consideration from FAG and

SKF's United States sales databases and to adjust the dumping margins accordingly; and it is further

ORDERED that this case is remanded to Commerce to include all expenses included in "total United States expenses" in the calculation of "total expenses" for FAG's constructed export price profit ratio; and it is further

ORDERED that this case is remanded to Commerce to remove the circumstances of sale adjustment for certain advertising expenses from FAG's normal value; and it is further

ORDERED that this case is remanded to Commerce to reconsider its decision to calculate SKF's home market credit expense rate based upon price and then apply that rate to cost; and it is further

ORDERED that this case is remanded to Commerce to examine the programming language for converting certain adjustments that SKF Italy reported on export prices for sales made through the foreign trade zone and through Sweden from foreign currency into United States dollars and to make appropriate corrections; and it is further

ORDERED that Commerce's determination is affirmed in all other respects; and it is further

ORDERED that the remand results are due within ninety (90) days of the date this opinion is entered. Any responses or comments are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days after the date responses or comments are due.

(Slip Op. 00-155)

KANEMATSU USA INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 95-04-00405

[Plaintiff's motion and Defendant's cross-motion for summary judgment denied.]

(Decided November 21, 2000)

Serko & Simon LLP, (*Daniel J. Gluck*, *David Serko*, *Jerome L. Hanifin*) for Plaintiff.

David W. Ogden, Assistant Attorney General, *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, *Bruce N. Stratvert*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Chi S. Choy*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, Of Counsel, for Defendant.

OPINION

POGUE, *Judge*: This case is before the court on motions for summary judgment pursuant to USCIT Rule 56. Plaintiff, Kanematsu USA Inc. ("Plaintiff"), challenges a decision of the United States Customs Service ("Customs") denying Plaintiff's protests filed in accor-

dance with section 514 of the Tariff Act of 1930, as amended. See 19 U.S.C. § 1514 (1994). At issue is the proper tariff classification under 19 U.S.C. § 1202 (1988), Harmonized Tariff Schedule of the United States ("HTSUS"), of Plaintiff's imported Power Take Off ("PTO") clutch/brakes. Jurisdiction is proper based on 28 U.S.C. § 1581(a)(1994).

BACKGROUND

In 1992 and 1993, Plaintiff imported Ogura PTO clutch/brakes.[1] Upon importation, Customs classified the merchandise under subheading 8505.20.00, HTSUS (1992),[2] arguing that the PTO clutch/brake was composed of an electromagnetic clutch and an electromagnetic brake. Subheading 8505.20.00, HTSUS, covers certain electrical equipment, specifically, "electromagnetic couplings, clutches, and brakes[.]" Customs classification of the PTO clutch/brake within this heading resulted in the assessment of a 3.9 % *ad valorem* duty. Plaintiff protests Customs' classification, arguing that the appropriate subheading is 8708.99.10, HTSUS, under which the goods would be eligible for duty-free treatment. According to Plaintiff, the subject merchandise is composed of an electromagnetic clutch and a mechanical brake. Therefore, Plaintiff claims, it is inappropriate to classify the goods within a heading providing exclusively for electrical equipment. Plaintiff claims that the subject merchandise is classifiable as "parts of tractors suitable for agricultural use," under subheading 8708.99.10, HTSUS.

STANDARD OF REVIEW

This case comes before the court on Plaintiff's motion and Defendant's cross-motion for summary judgment. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." USCIT R. 56(c). When "a reasonable trier of fact" could return a verdict for the non-movant, based on a factual dispute, summary judgment will be denied. *Erdle v. United States*, 23 CIT __, __, slip op. 99-7, at 6 (Jan. 15, 1999).

DISCUSSION

The merchandise at issue is a PTO clutch/brake. The parties agree that it is a unique good, containing both a clutch and a brake. *See* Pl.'s Mem. Supp. Mot. Summ. J., at 2 ("Pl's Brief"); Def.'s Mem. Supp. Cross-Mot. Summ. J., at 15 ("Def.'s Brief"). The parties also agree that the clutch portion of the subject merchandise is an electromag-

[1] The PTO clutch/brakes at issue were manufactured by Ogura in Japan and imported by Plaintiff Kanematsu.

[2] The 1993 version of 8505.20.00 is identical. The 1992 and 1993 versions of the other subheading at issue, 8708.99.10, are also identical.

netic clutch. *See* Pl.'s St. of Facts, at ¶ 9; Def.'s Resp. to Pl.'s St. Facts, at ¶ 9. The parties disagree, however, on whether the brake portion is an electromagnetic brake or a mechanical one.

Plaintiff argues that the PTO clutch/brake has four subassemblies: a field assembly, a rotor assembly, a clutch armature assembly, and a mechanical brake. *See* Pl.'s Brief, at 6. The brake, according to Plaintiff, is a mechanical brake, because the leaf springs put the brake into motion. *See id.* at 8. Plaintiff claims that the clutch and brake function independently. *See* Pl.'s Resp. to Def.'s Mot. for Summ. J. and Reply to Def.'s Opp. to Pl.'s Mot. for Summ. J., at 18 ("Pl.'s Reply"). Plaintiff argues that in order for the brake to be an electromagnetic brake, it must contain a coil specifically for use with the brake. *See* Pl.'s Brief, at 16. Therefore, according to Plaintiff, if the PTO clutch/brake consists of an electromagnetic clutch and an electromagnetic brake, there must be two coils, one working with the brake and one working with the clutch. *See id.* Because there is no such coil, Plaintiff concludes that the brake must be considered a mechanical brake. *See id.*

Customs, on the other hand, argues that there are three subassemblies in the PTO clutch/brake: a field assembly, a rotor assembly, and an armature assembly. *See* Def.'s Brief, at 7, 12. Customs takes the view that the braking and clutching functions are dependent on each other. *See id.* at 9. Due to this dependence, Customs claims, only one coil is necessary for both the clutch and brake to be electric. *See id.* at 20-21. Although Customs agrees that the brake is spring engaged and electrically released, Customs argues that this brake is an electromagnetic one. *See id.* at 9-10. Specifically Customs argues that the brake is a spring-set brake or a fail-safe brake, which Plaintiff denies. *See id.* at 10.

Importantly, Plaintiff and Customs do not agree on the mechanics or the purpose of electromagnetic spring-set brakes. *See* Pl.'s Reply, at 22-26; Def.'s Reply, at 3-4. Customs argues that the brake portion of the PTO clutch/brake is an electromagnetic spring-set brake. *See* Def.'s Brief, at 10. Under this analysis, the brake is electromagnetic and, therefore, classifiable within Heading 8505. Plaintiff claims that, to the contrary, electromagnetic spring-set brakes and the brake at issue have different methods of operation, *see* Pl.'s Reply, at 22-26, which influence the categorization of brakes. In accordance with Plaintiff's argument, the brake is mechanical, or, at the most, a mechanical brake under the control of an electric current. *See id.* at 26-27. As a result, under Plaintiff's analysis the merchandise is excluded from Heading 8505 by the Explanatory Notes. *See* Harmonized Commodity Description and Coding System, Explanatory Notes (1st ed. 1986)("Explanatory Notes") at 1341 (referring to electromagnetic brakes in heading 8505, the Explanatory Notes explain that this "heading *does not*, however, *cover* mechanical hydraulic or pneumatic brakes controlled by electro-magnetic devices")(emphasis in original).

Both parties cite to *Machine Design: Basics of Design Engineering*,

June 1993, to explain the mechanics of mechanical and electromagnetic brakes. Plaintiff focuses on the definition that describes a mechanical brake as one that acts "by generating frictional forces as two surfaces rub against each other." *Id.* at 95; *see also* Pl.'s Brief, at 16. Customs argues that the appropriate description of the brake portion of the PTO clutch/brake is found under the entry for "electric brakes." This definition is for a fail-safe brake, and describes the brake as one "actuated by pressure from a spring . . . with the electrical force used to disengage the brake." *Machine Design*, at 96; *see also* Def.'s Brief, at 17-18. Because Plaintiff disagrees with Customs as to whether the brake portion of the PTO clutch/brake works in a similar manner to a fail-safe brake, issues of material fact bearing on the classification of the subject merchandise remain.

"Where there are material facts at issue on a motion for summary judgment, the court cannot examine the evidence and make findings of fact." *Erdle*, 23 CIT at __, slip op. 99-7, at 8; *see also Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998). Here genuine issues of material fact exist; accordingly we deny both motions for summary judgment.

CONCLUSION

Plaintiff's motion and defendant's cross-motion for summary judgment are hereby denied. The parties are directed to file an order governing preparation for trial.

(Slip Op. 00-156)

U.S. STEEL GROUP, A UNIT OF USX CORPORATION, ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 99-08-00523

[Agency action remanded for reconsideration consistent with this opinion.]

(Decided November 21, 2000)

Dewey Ballantine LLP (*Alan Wm. Wolff, Michael H. Stein*) and *Skadden, Arps, Slate, Meagher & Flom LLP* (*Robert E. Lighthizer, John J. Mangan*) for Plaintiffs.

David W. Ogden, Assistant Attorney General, *David M. Cohen*, Director, *Lucius B. Lau*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Myles S. Getlan*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel, for Defendant.

OPINION

POGUE, *Judge*: This matter is before the Court on the motion of U.S. Steel Group, a Unit of USX Corporation; Bethlehem Steel Cor-

poration; Ispat Inland, Inc.; LTV Steel Company, Inc.; and National Steel Corporation (collectively "Plaintiffs"), for Judgment Upon the Agency Record pursuant to USCIT R. 56.2. Plaintiffs challenge the determination of the U.S. Department of Commerce (hereinafter "Commerce" or "the Department") to suspend the antidumping investigation of Russian steel imports pursuant to a suspension agreement entered into with the Ministry of Trade of the Russian Federation (hereinafter "MOT"). *See* Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From the Russian Federation, 64 Fed. Reg. 38,642 (Dep't Commerce 1999)(suspension antidumping duty investig.) ("Steel From Russia"). Defendant opposes Plaintiffs' motion.[1]

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994).

BACKGROUND

On September 30, 1998, Plaintiffs filed a petition with Commerce alleging that certain hot-rolled steel products from Russia were being sold in the United States at less than fair value ("LTFV"). *See* Petition From Law Firm of Dewey/Skadden/Schagrin to Sec of Commerce (P.R. Doc. No. 2)(Sept. 30, 1998).[2] On October 22, 1998, Commerce initiated an antidumping duty investigation. *See* Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil, Japan, and the Russian Federation, 63 Fed. Reg. 56,607 (Dep't Commerce 1998)(initiation antidumping investig.). On November 25, 1998, the U.S. International Trade Commission ("ITC") published its preliminary determination, concluding that there was a reasonable indication that the domestic steel industry was threatened with material injury by Russian steel imports. *See* Certain Hot-Rolled Steel Products From Brazil, Japan, and Russia, 63 Fed. Reg. 65,221 (USITC 1999) (prel. determ.).

On February 22, 1999, Commerce and MOT initialed a proposed agreement to suspend the antidumping duty investigation of Russian steel imports. *See* Pl.'s Mem. Supp. Mot. J. Agency R., at App. 4 ("Pl.'s Br."). At Commerce's invitation, *see* Letter to Interested Parties Requesting Comments on Proposed Suspension Agreement (P.R. Doc. No. 418)(Feb. 23, 1999), Plaintiffs submitted comments on the proposed agreement, *see* Letter From Law Firm of Skadden/Dewey/Shagrin Submitting Comments on Proposed Suspension Agreement (P.R. Doc. No. 424) (Apr. 5, 1999). After further negotiations with MOT, Commerce changed the proposed agreement somewhat, *see* Pl.'s Br. at 4, and on July 12, 1999, entered into a suspension agreement pursuant to 19 U.S.C. § 1673c(l). *See* Steel From Russia, 64 Fed. Reg. at 38,643 (App. I)(hereinafter "Agreement").

Prior to entering into the suspension agreement, on February 25, 1999, Commerce made a preliminary determination that Russian hot-rolled steel was being, or was likely to be sold in the U.S. at LTFV.

---

[1] JSC Severstal had intervened in this action on behalf of Defendant, but withdrew on October 19, 2000.

[2] The administrative record contains two lists of documents: (1) public documents, which will be cited as "P.R. Doc"; (2) business propriety documents, which will be cited as "B.P. Doc."

See Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From the Russian Federation, 64 Fed. Reg. 9,312 (Dep't Commerce 1999)(prel. determ.). On July 7, 1999, the Plaintiffs requested that Commerce continue its antidumping duty investigation of Russian steel. *See* Letter From Law Firm of Dewey/Skadden/Schagrin to Sec of Commerce (P.R. Doc. No. 375)(July 7, 1999). On July 19, 1999, Commerce published its final determination of sales at less-than-fair value, *see* Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From the Russian Federation, 64 Fed. Reg. 38,626 (Dep't Commerce 1999)(final determ.), and also published notice that it was suspending the investigation in light of the Agreement, *see* Steel From Russia, 64 Fed. Reg. at 38,642. On August 27, 1999, the ITC published its final determination, confirming that the domestic industry was being materially injured by reason of imports of Russian steel. *See* Certain Hot-Rolled Steel Products From Brazil and Russia, 64 Fed. Reg. 46,951 (USITC 1999) (final determ.).

Plaintiffs allege that Commerce unlawfully entered into the Agreement because the terms of the Agreement fail to meet two of the requirements of the governing statute. *See* Pl.'s Br. at 2. Pursuant to 19 U.S.C. § 1673c(l), Commerce may enter into a suspension agreement with a nonmarket economy only if, first, the agreement is in the public interest and may be effectively monitored,[3] and second, the agreement prevents price suppression or undercutting. *See* 19 U.S.C. § 1673c(l)(1) (1994). The notice of Commerce's decision to suspend the investigation does not itself contain an analysis of the statutory requirements or the evidentiary basis for the agency's decision. Rather, Commerce adopted, and incorporated by reference, two "Memoranda": the "Price Suppression Memorandum" (P.R. Doc. No. 396) (July 12, 1999), and the "Public Interest Memorandum" (P.R. Doc. No. 426) (July 12, 1999). It is these memoranda that provide the basis for the agency's decision.

STANDARD OF REVIEW

Commerce's determination to suspend the antidumping duty investigation at issue here is reviewable pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iv). *See* 19 U.S.C. § 1516a(a)(2)(B)(iv) (1994). The court must sustain Commerce's final determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B).

In determining whether Commerce's interpretation and application of the antidumping statute is in accordance with the law, "[f]irst, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-

[3] Commerce's determination that the Agreement may be effectively monitored has not been challenged here.

43 (1984)(citing several pre-1984 cases). If the statute is ambiguous, then the court must consider whether the format in which the interpretation is expressed is a format that carries the "force of law." *See Christensen v. Harris County*, 120 S. Ct. 1655, 1662 (2000). If it is, then the court asks whether the agency's interpretation of the statute is reasonable. *See Chevron*, 467 U.S. at 842. If the agency's interpretation of an ambiguous statute is expressed in a format that does not carry "the force of law," it is "'entitled to respect' . . . but only to the extent that [the] interpretation[] ha[s] the 'power to persuade.'" *Christensen*, 120 S. Ct. at 1663 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).[4]

Substantial evidence is "something less than the weight of the evidence." *Consolo v. Federal Maritime Com.*, 383 U.S. 607, 620 (1966). Nonetheless, Commerce must present "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Gold Star Co. v. United States*, 12 CIT 707, 709, 692 F. Supp. 1382, 1383-84 (1988)(internal quotation omitted), *aff'd sub nom. Samsung Elec. Co. v. United States*, 873 F.2d 1427 (Fed. Cir. 1989). The possibility of drawing two inconsistent conclusions from the same evidence does not mean that the agency's finding is unsupported by substantial evidence. *See Consolo*, 383 U.S. at 620. In other words, Commerce's determination will not be overturned merely because the plaintiff "is able to produce evidence . . . in support of its own contentions and in opposition to the evidence supporting the agency's determination." *Torrington Co. v. United States*, 14 CIT 507, 514, 745 F. Supp. 718, 723 (1990)(internal quotation omitted), *aff'd* 938 F.2d 1276 (Fed. Cir. 1991). Commerce's conclusions must, however, be "reached by 'reasoned decisionmaking,' including an examination of the relevant data and a reasoned explanation supported by a stated connection between the facts found and the choice made." *Electricity Consumers Resource Council v. Federal Energy Regulatory Com.*, 747 F.2d 1511, 1513 (D.C. Cir. 1984) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

DISCUSSION

Commerce's statutory authority to terminate or suspend an anti-

---

[4] Counsel for Commerce asks us to give *Chevron* deference to the legal interpretations contained in the Price Suppression and Public Interest Memoranda. *See* Def.'s Supp. Br. at 1-4. Because of our conclusion that Commerce's memoranda are on their face not in accordance with law, we do not decide here whether *Chevron* or *Christensen* applies.

We note, however, that, as far as is apparent from the record at hand, the domestic producers had neither notice of nor an opportunity to comment on the memoranda. The rationale behind *Chevron* was to recognize instances in which Congress had implicitly delegated primary interpretational authority of the statute to the agency, and thus intended to prevent the judiciary from substituting its interpretation of the statute for that of the agency's. *See Chevron*, 467 U.S. at 842-44. Where it is clear that Congress intended to delegate interpretational authority–that is, in the cases of formal adjudication and notice-and-comment rulemaking–Congress also provided for due process protection as a counter to the exercise of coercive governmental power. *See* 5 U.S.C. §§ 553, 554, 556, 557. In the absence of due process protection, it would appear problematic to infer that Congress intended the agency to use this format to act with "the force of law." *See E.I. du Pont de Nemours and Company v. United States*, 24 CIT '__, __, slip op. 00-122, at 8 n.6 (Sept. 20, 2000) (declining, in dicta, to extend *Chevron* deference to a Treasury Decision because there was no evidence of formal rulemaking procedures)(citing *Christensen*, 120 S. Ct. at 1662). *See also Luigi Bormioli Corp., Inc. v. United States*, 24 CIT __, __, slip op. 00-134, at 9 (Oct. 19, 2000).

dumping investigation is found in Section 734 of the Tariff Act of 1930 ("1930 Act").[5] *See* 19 U.S.C. § 1673c. Section 734(l), which governs the Agreement with MOT, gives Commerce the authority to suspend an investigation with a nonmarket economy, pursuant to an agreement restricting the volume of imports into the United States. *See* 19 U.S.C. § 1673c(l)(1). Suspension agreements under subsection (l) must meet the criteria of subsection (d). *See* 19 U.S.C. § 1673c(l)(1)(A). Subsection (d) allows Commerce to enter into an agreement only if it is in the public interest and is capable of being effectively monitored. *See* 19 U.S.C. § 1673c(d). A suspension agreement with a nonmarket economy must also prevent price suppression or undercutting. *See* 19 U.S.C. § 1673c (l)(1)(B).

I. *Commerce's "Public Interest" Determination*

Under the first prong of the statute, Commerce may enter into a suspension agreement only if it is in the public interest. *See* 19 U.S.C. § 1673c(l)(1)(A). In evaluating Commerce's determination that the Agreement is in the public interest, the court would, in a normal case, first decide whether Commerce's interpretation of the statute is in accordance with law. Here, however, Commerce has not articulated an interpretation of the statute in the Public Interest Memorandum itself. Only in subsequent briefing does Commerce interpret the public interest standard; a post hoc rationalization for agency action may not, however, be accepted by this court. *See, e.g., Allegheny Ludlum Corp. v. United States*, 24 CIT __, __, slip op. 00-109, at 43 n.41 (Aug. 28, 2000)("[T]he court declines to let Defendant's counsel read into the Final Determination a rationale not advanced by the commissioners themselves."); *see also Burlington Truck Lines*, 371 U.S. 156, 168-69 ("The courts may not accept . . . counsel's *post hoc* rationalizations for agency action; [*SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947),] requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself.").

---

[5] Section 734(a) gives Commerce the authority to terminate an investigation upon the withdrawal of the petition, which may occur pursuant to an agreement restricting the volume of imports into the United States. *See* 19 U.S.C. § 1673c(a). Before concluding a quantitative restriction agreement, Commerce must determine whether it is in the public interest by taking into account three factors:

> (i) whether, based upon the relative impact on consumer prices and the availability of supplies of merchandise, the agreement would have a greater adverse impact on United States consumers than the imposition of antidumping duties;
> (ii) the relative impact on the international economic interests of the United States; and
> (iii) the relative impact on the competitiveness of the domestic industry producing the like merchandise, including any such impact on employment and investment in that industry.

19 U.S.C. § 1673c(a)(2)(B).

Section 734(b) gives Commerce the authority to suspend an investigation pursuant to an agreement with foreign producers stating either that they will cease dumping, or that they will cease exporting to the United States. *See* 19 U.S.C. § 1673c(b). Section 734(c) provides Commerce the authority to suspend an investigation pursuant to an agreement with foreign producers stating that they will "eliminate completely the injurious effect" of their exports to the United States. *See* 19 U.S.C. § 1673c(c). Given that a 734(c) agreement does not require foreign producers to either cease dumping or cease exporting, Congress has instructed Commerce to enter into such an agreement only when there are "extraordinary circumstances." *See* 19 U.S.C. § 1673c(c)(1). "Extraordinary circumstances" are those in which the investigation is complex, and the suspension would be more beneficial to the domestic industry than the continuation of the investigation. *See* 19 U.S.C. § 1673c(c)(2)(A).

Rather than articulate a legal standard in the Public Interest Memorandum, Commerce makes a finding of fact, *see* Def.'s Supp. Br. at 10, that, following entry into the Agreement, "[t]he resultant increase in market certainty will benefit traders and consumers of Hot-Rolled Flat-Rolled Carbon-Quality Steel Products." Public Interest Mem. at 2. From this, Commerce concludes that it is in the public interest to enter into the Agreement. Without more explanation, however, this conclusion is not reviewable, because Commerce has not provided a legal standard for what is "in the public interest," or otherwise articulated how its factual finding is related to the statutory standard.

The court must "satisfy itself that the agency exercised a *reasoned* discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent." *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir.)(1971)(emphasis added). Here, given the agency's failure to explain its public interest determination, this Court cannot determine that Commerce connected its "market certainty" finding to its conclusion that the Agreement is in the public interest in a reasoned way that is in accordance with the statute. Accordingly, the court is not satisfied that Commerce exercised reasoned discretion. Commerce's public interest determination is remanded so that Commerce may articulate a legal standard for making its public interest determination, or otherwise explain the connection between the facts found and the choice made pursuant to the statute.[6]

II. *Commerce's Determination that the Agreement Will Prevent Price Suppression or Undercutting*

Under the second prong of the statute, Commerce may enter into a suspension agreement only if it "will prevent the suppression or undercutting of price levels of domestic products by imports of the merchandise under investigation." 19 U.S.C. § 1673c(l)(1)(B). In its Price Suppression Memorandum, Commerce articulates a sort of legal standard; it is, however, a standard that, on its face, is not in accordance with the law.

Commerce argues that neither the statute, Commerce regulations, nor the legislative history contain a definition of "price suppression or undercutting," and that therefore Commerce "has broad discretion to apply reasonable interpretations of the antidumping law." Price Suppression Mem. at 1-2. Commerce interprets the statute to mean that subsection (l) agreements with nonmarket economies "allow for some amount of price affect [sic] on domestic price levels." *Id.* at 3. Consequently, Commerce reasons that it may enter legally into an agreement that involves a fungible commodity, such as the steel at issue in this case, "the introduction of even a small quantity of [which] should, under basic supply and demand theory, have *some* tendency

[6] We decline to undertake a "substantial evidence" review of Commerce's factual finding regarding market certainty pending Commerce's redetermination on remand.

to affect prices." *Id.* In its brief, Commerce attempts to refine this proposed standard by arguing that the court should "import" the "significant degree" standard from the statute governing the ITC's price analysis for purposes of making its material injury determination.[7] Def.'s Mem. Opp. to Pl.'s Mot. J. Agency R. at 31-36 ("Def.'s Br."). Commerce thereby suggests that a subsection (l) agreement must prevent not all price suppression, but rather all significant price suppression; put another way, "a subsection (l) agreement may properly permit minor or inconsequential injury through minor or inconsequential price suppression." Def.'s Br. at 34.

Plaintiffs disagree with Commerce's legal analysis, asserting that the statute states plainly on its face that *no* price suppression or depression is allowed under subsection (l) agreements. *See* Pl.'s Br. at 8, 17-19. Plaintiffs further disagree with Commerce's presumption that the introduction of any amount of a fungible commodity tends to affect prices: "subject imports, priced at a high enough level, would not suppress or depress prices . . . ." *Id.* at 19.

Plaintiffs' contention that the meaning of the statute is clear on its face does not persuade us. One could understand the word "prevent" to mean "preclude." *See The American Heritage Dictionary* 1436 (3d ed. 1992). In this sense, "prevent price suppression" would mean that Commerce could enter into a suspension agreement only if it excluded the possibility of price suppression. But "avert" and "impede" are also synonyms of "prevent." *See id.* "Avert" means "to ward off," *see id.* at 128, and "impede" means "to retard or obstruct the progress of," *see id.* at 905. This second sense of the word implies more flexibility; Commerce could enter into a suspension agreement so long as the agreement counteracted price suppression. The language itself has two different meanings, and thus the statute is by definition ambiguous. The rules of statutory construction may present a clear choice on remand between differing interpretations of an ambiguous provision; these rules do not, however, advance the argument asserted by Plaintiffs that the statute is clear on its face. *See* Pl.'s Reply Br. at 3-6.

We do not accept Commerce's interpretation of the statute, however, because the interpretation set forth in the Price Suppression Memorandum itself is, on its face, not in accordance with the law. *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90 (1953), made clear that "Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body." Commerce's proposed standard–"allow[s] for some amount of price affect [sic] on domestic price levels"–places no limit on Commerce's discretion to determine

[7] Section 771(7)(C) of the 1930 Act provides:

> In evaluating the effect of imports of [subject] merchandise on prices, the [ITC] shall consider whether (I) there has been *significant* price underselling by the imported merchandise as compared with the price of like products of the United States, and (II) the effect of imports of such merchandise otherwise depresses prices to a *significant degree*, or prevents price increases, which otherwise would have occurred, to a *significant degree*.

19 U.S.C. § 1677(7)(C)(ii)(I)-(II) (emphasis added).

that an agreement prevents price suppression or undercutting. While we recognize that Commerce has substantial discretion to negotiate suspension agreements with nonmarket economies, Commerce has here adopted a standard that allows it, contrary to law, to exercise "unbounded" discretion.[8]

In short, given the agency's failure to articulate a proper legal standard to guide its price suppression determination, the Court is not satisfied that Commerce exercised reasoned discretion in arriving at the conclusion that the Agreement prevents price suppression or undercutting. Therefore, Commerce's price suppression determination is remanded so that Commerce may articulate an appropriate legal standard for making its price suppression determination, or otherwise explain the connection between the facts found and the choice made pursuant to the statute.[9]

CONCLUSION

Commerce shall reconsider its determination in a manner consistent with this opinion, pursuant to 19 U.S.C. § 1516a(c)(3). Commerce shall file its remand determination with the Court within 90 days. Plaintiffs are granted 30 days to file comments on the remand determination. Commerce may respond to any comments filed within 20 days.

U.S. STEEL GROUP, A UNIT OF USX CORPORATION, ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 99-08-00523

ORDER

This action has been duly submitted for decision, and this Court, after due deliberation, has rendered a decision herein; now, in conformity with that decision, it is hereby

ORDERED that the Department of Commerce's determination to suspend the investigation in Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from the Russian Federation, is remanded for reconsideration consistent with this opinion.

---

[8] The "significant degree" standard forwarded in Commerce's brief must be disregarded here because, once again, it is plainly a post hoc rationalization. *See Allegheny Ludlum*, 24 CIT at __, slip op. 00-109, at 43 n.41; *Burlington Truck Lines*, 371 U.S. at 168-69. Although Commerce mentions the "significant degree" standard used by the ITC in the Price Suppression Memorandum, *see* Price Suppression Mem. at 3, it is not clear that Commerce's "some amount" means "a significant degree."

[9] We decline to undertake a "substantial evidence" review of Commerce's factual findings regarding price suppression or undercutting pending Commerce's redetermination on remand.

(Slip Op. 00-157)

TRANSCOM, INC., PLAINTIFF, AND L & S BEARING COMPANY, PLAINTIFF-INTERVENOR *v.* THE UNITED STATES, DEFENDANT, AND THE TIMKEN COMPANY, DEFENDANT-INTERVENOR

Court No. 97-02-00249

Plaintiff Transcom, Inc. ("Transcom") moves pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the United States Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Final Results and Partial Termination of Antidumping Duty Administrative Review on Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China* ("*Final Results*"), 62 Fed. Reg. 6173 (Feb. 11, 1997). Transcom alleges that Commerce unlawfully subjected merchandise imported by Transcom through exporters not properly designated in Commerce's notice of initiation of an antidumping review to certain determinations Commerce made as a result of the review.

Held: Transom's USCIT R. 56.2 motion is granted. This case is remanded to Commerce to liquidate Transcom's relevant entries at a rate equal to the cash deposit required on the merchandise at the time of entry pursuant to 19 C.F.R. § 353.22(e) (1995).

[Transcom's motion is granted. Case remanded.]

(Dated November 22, 2000)

Neville, Peterson & Williams (*George W. Thompson, John M. Peterson* and *Curtis W. Knauss*) for plaintiff.

Cohen Darnell & Cohen, P.L.L.C. (*Mark A. Cohen*) for plaintiff-intervenor.[1]

David W. Ogden, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Henry R. Felix*); of counsel: *Mildred E. Steward*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendant.

Stewart and Stewart (*Terence P. Stewart, James R. Cannon, Jr., Amy S. Dwyer, Geert De Prest* and *Mara M. Burr*) for defendant-intervenor.

OPINION

TSOUCALAS, *Senior Judge*: Plaintiff Transcom, Inc. ("Transcom") moves pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the United States Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Final Results and Partial Termination of Antidumping Duty Administrative Review on Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China* ("*Final Results*"), 62 Fed. Reg. 6173 (Feb. 11, 1997). Transcom alleges that Commerce unlawfully subjected merchandise imported by Transcom through exporters not properly designated in Commerce's notice of initiation of an antidumping review to certain determinations Commerce made as a result of the review.

[1] L & S Bearing Company has intervened in this action but did not file a motion for judgment upon the agency record and supporting brief.

BACKGROUND

This case concerns the eighth administrative review of the antidumping duty order on tapered roller bearings ("TRBs") and parts thereof, finished and unfinished, imported from the People's Republic of China ("PRC") during the period of review ("POR") covering June 1, 1994, through May 31, 1995. Commerce reviewed and published the preliminary results on August 5, 1996. *See Preliminary Results of Antidumping Administrative Review and Intent To Revoke Antidumping Duty Order in Part on Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China* ("*Preliminary Results*"), 61 Fed. Reg. 40,610. On February 11, 1997, Commerce published the *Final Results*. *See* 62 Fed. Reg. 6173.

Since the administrative review at issue was initiated after December 31, 1994, the applicable law is the antidumping statute as amended by the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809 (1994) (effective Jan. 1, 1995). *See Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995) (citing URAA § 291(a)(2), (b) (noting effective date of URAA amendments)).

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a)(2) (1994) and 28 U.S.C. § 1581(c) (1994).

STANDARD OF REVIEW

The Court will uphold Commerce's final determination in an antidumping administrative review unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994); *see NTN Bearing Corp. of America v. United States*, 24 CIT ___, ___, 104 F. Supp. 2d 110, 115-16 (2000) (detailing Court's standard of review for antidumping proceedings).

DISCUSSION

I. *Insufficient Notice*

A. *Background*

This case concerns Commerce's procedure for conducting an administrative review and imposing antidumping duties. The procedure involves four steps: (1) Commerce publishes a notice of Opportunity to Request an Administrative Review for the POR at issue; (2) upon receipt of such request, Commerce publishes a notice of Initiation of an Administrative Review in the Federal Register; (3) Commerce, in order to obtain pertinent information, distributes or makes available questionnaires to those entities Commerce designated in the notice of Initiation; and (4) on the basis of the information gathered, Commerce determines the antidumping duty rates applicable to each entry or type of entries and publishes these determinations in the Federal Register. *See generally*, 19 U.S.C. § 1675(a)(1994); 19 C.F.R. §§ 353.22, 353.31 (1995). If after the publication of a notice of

Opportunity to Request an Administrative Review for the POR at issue, Commerce does not receive a timely or proper request for review, Commerce must "without additional notice . . . assess antidumping duties on the merchandise . . . at rates equal to the cash deposit of . . . estimated antidumping duties required on that merchandise at the time of entry . . . ." 19 C.F.R. § 353.22(e).

In this case, Commerce issued the antidumping duty order on May 27, 1987, and amended the order on February 26, 1990. *See Final Determination of Sales at Less Than Fair Value on Tapered Roller Bearings From the People's Republic of China*, 52 Fed. Reg. 19,748; *Amendment to Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order in Accordance With Decision Upon Remand on Tapered Roller Bearings From the People's Republic of China*, 55 Fed. Reg. 6669.

On June 6, 1995, Commerce published in the Federal Register a notice of Opportunity to Request an Administrative Review of the order covering the POR from June 1, 1994, through May 31, 1995. *See Opportunity to Request Administrative Review of Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation*, 60 Fed. Reg. 29,821. In response, The Timken Company ("Timken"), a United States producer of the subject merchandise, filed a request for review identifying by name 132 Chinese producers and exporters and nine Hong Kong exporters of the subject merchandise. *See* Def.'s Mem. Opp'n Pl.'s Mot. J. Agency R. ("Def.'s Mem.") at 4-5 (citing to P.D. 3; Fi. 3, Fr. 1, 3-13). Timken's list of 132 Chinese and nine Hong Kong entities did not include Direct Source International and Goldhill International Trading & Services Co. (collectively "Transcom's Hong Kong exporters"), entities that were Hong Kong nationals exporting TRBs from the PRC for Transcom, a United States importer. *See id.* at 8. Timken also requested a review of: (a) "all merchandise covered by the [antidumping duty] order, from whatever source"; and (b) merchandise from "any other exporter from Hong Kong or any other third country, . . . any other exporters or producers, wherever located, [that were] presently or previously part of or includ[ed] within their names 'China National Machinery Import and Export Corporation' or . . . 'Machinery Import and Export Corporation.'" *See id.* at 4-5.

On August 16, 1995, Commerce initiated the administrative review at issue by publishing a notice of Initiation. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part* ("*Notice of Initiation*"), 60 Fed. Reg. 42,500.[2] The *Notice of Initiation* listed by name the 132 Chinese producers and exporters and nine Hong Kong exporters identified in Timken's request for review and, right at the outset, expressly provided that Commerce was "*not initiating an administrative review of*

[2] The regulation states that Commerce must publish "notice of 'Initiation of Antidumping Duty Administrative Review.'" 19 C.F.R. § 353.22(c)(1) (pattern of capitalization in original). Accordingly, any such notice is designated in this opinion as "notice of Initiation" except for the notice of Initiation at issue which is designated as *Notice of Initiation*.

any exporters and/or producers who were not named in [the] review request [submitted by Timken] because such exporters and/or producers were not specified as required . . . ." *Id.* at 42,500-01 (emphasis supplied). Simultaneously, the *Notice of Initiation* provided that "*[a]ll exporters* of TRBs from the People's Republic of China *[were] conditionally covered* by this review." *Id.* at 42,503 (emphasis supplied).

This combination of statements was a notable deviation from the language Commerce used in the notice of Initiation of the review immediately preceding the one at issue. In the notice of Initiation of the preceding review, Commerce stated, in a similar fashion, that "[a]ll other exporters of tapered roller bearings [were] conditionally covered." *Initiation of Antidumping Duty Administrative Reviews and Request for Revocation in Part*, 59 Fed. Reg. 43,537, 43,539 (Aug. 24, 1994). The preceding notice of Initiation, however, was silent about whether Commerce intended to review the entries from any exporters and/or producers not named in the request for review. The language indicating Commerce's intent to abstain from reviewing the entries from any exporters/producers unidentified or improperly identified in the request for review appeared for the first time in the *Notice of Initiation* at issue. *See Notice of Initiation*, 60 Fed. Reg. at 42,500-01.

After publication of the *Notice of Initiation*, Commerce distributed questionnaires to the respondents named in the *Notice of Initiation*. *See Preliminary Results*, 61 Fed. Reg. at 40,610. Commerce also made the questionnaires available for those parties that were not identified by name in the *Notice of Initiation* but who wished to submit required information in order to prevent a possible negative default determination. *See id.*; *cf. Preliminary Results of Antidumping Administrative Review on Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China*, 60 Fed. Reg. 49,572, 49,573-76 (Sept. 26, 1995) (discussing the case of Xiangfan International Trade Corp.); *Transcom v. United States* ("*Transcom CIT*"), 24 CIT ___, ___, Slip op. 00-146 at 12, 31 (Nov. 7, 2000).

Unaware of the existence of Transcom's Hong Kong exporters, Commerce did not provide them with the questionnaires, and Transcom's Hong Kong exporters and their PRC suppliers did not submit the questionnaires on their own. *See* Def.'s Mem. at 8; Pl.'s Br. Supp. Mot. J. Agency R. ("Pl.'s Br.") at 7.

After the period to submit the questionnaires expired, Commerce reviewed the information it had obtained and published the *Preliminary Results*. *See* 61 Fed. Reg. 40,610. The *Preliminary Results* released the rates allocated to the entries from the entities that provided Commerce with the information meriting the assignment of separate rates. *See id.* at 40,611-12. The *Preliminary Results* also indicated that those companies that did not respond to the questionnaires or responded in an insufficient way would not merit separate rates and, thus, would be subject to the default PRC rate. *See id.* at 40,613-14.

On August 23, 1996, Transcom entered its notice of appearance, arguing that Commerce's application of the default PRC rate was invalid with respect to the entries of those entities that abstained from responding to the questionnaires because they were not properly designated in the *Notice of Initiation* and, thus, not notified of the pending review. *See Final Results*, 62 Fed. Reg. 6186-87; Def.'s Mem. at 8 (citing to P.D. 166, Fi. 46, Fr. 53).

In the *Final Results*, Commerce refuted Transcom's argument and indicated that Transcom's entries from its Hong Kong exporters would be subject to the review and the PRC default rate. *See* 62 Fed. Reg. at 6187-88. Consequently, Transcom initiated the current proceedings and filed a brief before this Court identifying its Hong Kong exporters by name. *See* Def.'s Mem. at 8.

B. *Contentions of the Parties*

Transcom contends that under 19 U.S.C. § 1675(a) and 19 C.F.R. § 353.22, Commerce lacked authority to review and impose the resulting determinations upon entries of any entities other than those properly designated in the *Notice of Initiation*. *See* Pl.'s Br. at 13-20. Specifically, Transcom asserts that the language of 19 U.S.C. § 1675(a) and 19 C.F.R. § 353.22, as interpreted by case law and read in conjunction with Commerce's express statement that Commerce was "not initiating an administrative review of any exporters and/or producers who were not [properly] named in [the] review request," precludes Commerce from reviewing and imposing the default PRC rate upon the entries of entities other than those properly designated in Timken's request for review. *See id.*

Commerce argues that it was obligated to provide notice only to "respondents" determinable under the "first to know test," here, the PRC suppliers to Transcom's Hong Kong exporters. *See* Def.'s Mem. at 15-21. Alternatively, Commerce maintains that it provided Transcom and its Hong Kong exporters with constructive notice by including the statement that "[a]ll exporters of TRBs from the People's Republic of China [were] conditionally covered by this review" in the *Notice of Initiation*. *See id.* at 48.

Timken agrees with Commerce that Transcom's entries were subject to the determinations Commerce made in its *Final Results* because the statement "[a]ll exporters of TRBs from the People's Republic of China are conditionally covered by this review" provided Transcom and its Hong Kong exporters with constructive notice of the pending review. *See* Timken's Resp. Opp'n Pl.'s Mot. J. Agency R. ("Timken's Resp.") at 12-14. In addition, Timken alleges that Transcom's challenge to the *Preliminary Results* indicates Transcom's awareness of the fact that its entries were subject to the review and constitutes Transcom's de facto admission of being on notice. *See id.* at 14.

C. *Analysis*

1. *Commerce's Obligation to Notify*

Commerce argues that under the "first to know test," Commerce was obligated to notify only the PRC suppliers to Transcom's Hong Kong exporters. *See* Def.'s Mem. at 15-21. The Court addressed this issue in *Transcom CIT* and held that Commerce's assertion was contrary to the applicable statute, regulation and case law.[3] *See* 24 CIT ___, ___, Slip op. 00-146 at 18-21 (relying on 19 U.S.C. § 1675(a); 19 C.F.R. § 353.22(c) (1994); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) ; *Transcom, Inc. v. United States* ("*Transcom CAFC*"), 182 F.3d 876 (Fed. Cir. 1999)). Since the issue and the arguments presented in the instant case are identical to those in *Transcom CIT*, the Court adheres to its reasoning in *Transcom CIT*. Accordingly, the Court finds that Commerce was obligated to adequately notify all parties whose interests could be affected by the administrative review. *See Transcom CAFC*, 182 F.3d at 882-84; *Transcom CIT*, 24 CIT ___, ___, Slip op. 00-146 at 18-21.

2. *Insufficiency of Notice Ensuing From the Language of the Notice of Initiation*

A request for an administrative review must be submitted by an interested party. *See* 19 C.F.R. § 353.22(a). The term "interested party" includes "[a] producer in the United States of the like product . . . ." 19 C.F.R. § 353.2(k)(3) (1995). In the instant case, Timken is the interested party. Timken's request for the administrative review: (a) catalogued the names of 132 Chinese producers and exporters and nine Hong Kong exporters; (b) identified a somewhat amorphous class of "other exporters or producers, wherever located, [that were] presently or previously part of or includ[ed] within their names 'China National Machinery Import and Export Corporation' or . . . 'Machinery Import and Export Corporation'"; and (c) designated a general category of those entities whose entries were "merchandise covered by the order, from whatever source." *See* Def. Br. at 4-5 (citing P.D. 3; Fi. 3; Fr. 1-13).

The interested party, however, may request an administrative review of only "*specified individual* producers or resellers . . . ." 19 C.F.R. § 353.22(a) (emphasis supplied). The phrase "specified individual producers or resellers" is interpreted by case law to mean that, in making a request for a review, the interested party should exhaust all avenues reasonably available in its attempts to specifically identify the entities to be reviewed before designating a general category of entities. *See* 19 C.F.R. § 353.22(a); *Floral Trade Council v. United States*, 17 CIT 1417, 1418 (1993). There is no evidence showing that Timken exhausted all avenues reasonably available to it. Consequently, Timken's identification of those entities whose entries were

[3] Although *Transcom CIT* was a pre-URAA case and the instant case is post-URAA, the outcome does not change as a result of the amendments.

"merchandise covered by the order, from whatever source" was an invalid designation of a general category. *See Floral Trade Council*, 17 CIT at 1417, 1419 (holding that an interested party could not request a review of the entire Columbian industry, leaving to Commerce the task of gathering the names of all relevant producers and exporters). The language of Timken's request had to be read without this invalid designation. *See* 19 C.F.R. § 353.22(a); *accord Notice of Initiation*, 60 Fed. Reg. at 42,500-01. It follows that Commerce, as long as it was proceeding upon Timken's request, had the authority to review either the 132 Chinese producers/exporters and nine Hong Kong exporters listed by Timken (collectively "132 and nine companies") or, possibly, the 132 and nine companies plus all "other exporters or producers, wherever located, [that were] presently or previously part of or includ[ed] within their names 'China National Machinery Import and Export Corporation' or . . . 'Machinery Import and Export Corporation'" (collectively "132 and nine companies plus a certain class").[4]

Commerce must designate in its notice of Initiation those entities whose interest in entries of merchandise might be affected by the review in order to subject these entries to Commerce's determinations. *See generally*, 19 C.F.R. §§ 353.22(a), 353.29(a) (1995). The designation in a notice of Initiation provides these entities with notice of pending review and enables them to participate meaningfully. *See* 19 U.S.C. § 1675(a); 19 C.F.R. § 353.22(a); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Transcom CAFC*, 182 F.3d at 881-84; *Transcom CIT*, 24 CIT ___, ___, Slip op. 00-146 at 24-25. Commerce's failure to provide adequate notice is a violation of Commerce's statutory and regulatory obligations that makes the resulting determinations procedurally defective and inoperative with regard to the entries of those entities that did not receive adequate notice. *See Transcom CAFC*, 182 F.3d at 880, 884; *see generally*, *Mullane*, 339 U.S. 306. In the instant case, as discussed below, the scope-limiting statement that Commerce was "not initiating an administrative review of any exporters and/or producers who were not [properly] named in [the] review request" submitted by Timken superceded the scope-enlarging statement that "[a]ll exporters of TRBs from the People's Republic of China [were] conditionally covered." The scope-limiting statement stripped Transcom of its right to notice of the review, thus, making the determinations in the *Final Results* inoperative with regard to Transcom's entries from its Hong Kong exporters.

---

[4] A requesting interested party "must bear the . . . burden imposed on it by the regulation to name names" of the entities to be reviewed. *Floral Trade Council*, 17 CIT at 1418-19. However, "the burdens on the requester are those caused by the mechanics of triggering the review that is actually desired. In practical terms, these burdens should be minimal." *Id.* at 1418. In other words, a requesting interested party could probably satisfy its burden to "name names" by providing an encompassing term specifically identifying a precise and limited class, so the designation would be more analogous to "naming names" than to vaguely outlining a general category of entities. *See* 19 C.F.R. § 353.22(a); *Floral Trade Council*, 17 CIT at 1418-19. The Court, however, does not need to reach this issue in the instant case because, as it is discussed below, the outcome remains the same regardless of whether or not Timken validly requested the review of "other exporters or producers, wherever located, [that were] presently or previously part of or includ[ed] within their names 'China National Machinery Import and Export Corporation' or . . . 'Machinery Import and Export Corporation.'"

If Commerce reviews entries of merchandise from a non-market economy, it can satisfy the notice requirement by designating the entities in a notice of Initiation either by name or by a defining phrase that is "reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314 (citations omitted); see *Transcom CAFC*, 182 F.3d at 881-82; *Transcom CIT*, 24 CIT ___, ___, Slip op. 00-146 at 23-32. The phrase "[a]ll exporters of TRBs from the People's Republic of China [were] conditionally covered by this review," included in the *Notice of Initiation*, was a defining phrase that, under the circumstances, satisfied the notice requirement by reasonably alerting the entities to the pendency of the review. *See Transcom CAFC*, 182 F.3d at 881-82; *Transcom CIT*, 24 CIT ___, ___, Slip op. 00-146 at 23-32. The phrase implies that the scope of the review could be enlarged to encompass any entity that Commerce itself could make subject to the review in addition to the entities properly designated in the request for review by the interested party. *See generally*, *Transcom CAFC*, 182 F.3d at 880, 883; *Transcom CIT*, 24 CIT ___, ___, Slip op. 00-146 at 21-23; Def.'s Mem. at 48.

The *Notice of Initiation* also included a scope-limiting statement that Commerce was "not initiating an administrative review of any exporters and/or producers who were not [properly] named in [the] review request" by Timken. *Notice of Initiation*, 60 Fed. Reg. at 42,500-01. Two alternative meanings could have been inferred from this statement: (1) Commerce expressly limited its right of review to only the "132 and nine companies"; or (2) Commerce expressly limited its right of review to only the "132 and nine companies plus a certain class." In sum, the scope-limiting statement that Commerce was "not initiating an administrative review of any exporters and/or producers who were not named in [the] review request" by Timken potentially conflicted with the implied meaning of Commerce's scope-enlarging statement that "[a]ll exporters of TRBs from the People's Republic of China [were] conditionally covered by this review." Id. at 42,500-01, 42,503.

While the particular circumstances of this case might allow an interpretation harmonizing these incompatible statements,[5] the outcome remains the same: the notice provided by Commerce was pro-

[5] It can be fancied that the reason for Commerce's statement that "[a]ll exporters of TRBs from the People's Republic of China [were] conditionally covered" was not a desire to enlarge the scope of the review to encompass the entities other than those properly designated in Timken's request but rather a desire to validate Timken's usage of the questionable encompassing term "exporters or producers, . . . [that were] presently or previously part of or includ[ed] within their names 'China National Machinery Import and Export Corporation' or . . . 'Machinery Import and Export Corporation.'" Such interpretation allows a harmonized reading of the statements that: (1) Commerce was "not initiating an administrative review of any exporters and/or producers who were not named in [the] review request" and (2) Commerce deemed "[a]ll exporters of TRBs from the People's Republic of China [to be] conditionally covered" by the review. In that case, the scope-limiting statement that Commerce was "not initiating an administrative review of any exporters and/or producers who were not named in [the] review request" narrows the scope of the review to the "132 and nine companies plus a certain class." Granting that, the entries from Transcom's Hong Kong exporters would be excluded from the scope of the review because Transcom's Hong Kong exporters were neither listed among the "132 and nine companies" nor presently or previously part of or included within their names the term "China National Machinery Import and Export Corporation" or "Machinery Import and Export Corporation." Thus, under this interpretation, the aggregated language of the *Notice of Initiation* could not amount to adequate notice that Transcom's entries from its Hong Kong exporters were subject to the review. *See Transcom CAFC*, 182 F.3d at 883-84.

cedurally insufficient with regard to Transcom's entries from its Hong Kong exporters.

The Court believes that Commerce's statement that "[a]ll exporters of TRBs from the People's Republic of China are conditionally covered" signified Commerce's desire to enlarge the scope of the review to encompass entities other than those properly designated in Timken's request, that is, entities neither on the list of "132 and nine companies" nor on "132 and nine companies plus a certain class." *See Transcom CAFC*, 182 F.3d at 882; *Transcom CIT*, 24 CIT ___, ___, Slip op. 00-146 at 24, 31-32; Def.'s Mem. at 48. This scope-enlarging statement, therefore, was in conflict with Commerce's scope-limiting statement that Commerce was "not initiating an administrative review of any exporters and/or producers who were not [properly] named in [the] review request" submitted by Timken.

Between two incompatible agency statements, as with conflicting statutory authorities, the more specific one must prevail. *Cf. Smith v. Berry Co.*, 198 F.3d 150, 152 (5th Cir. 1999) (holding that among two conflicting statutes, the more specific statute prevails over the more general one); *see Kinney v. Yerusalim*, 812 F. Supp. 547, 550 (E.D. Penn. 1993) (finding that the more specific agency regulation supersedes the more general provision). The degrees of specificity of the two statements at issue are different. The statement that Commerce was "not initiating an administrative review of any exporters and/or producers who were not [properly] named in [the] review request" was a narrowly-tailored concrete declaration. It provided that any party not included on the list of "132 and nine companies" (or "132 and nine companies plus a certain class") had no reason to be concerned about the outcome of the review. Considering the ambiguities inherently associated with descriptive language, one can hardly make a statement more specific than a list of names.[6] *See e.g., Ayala v. United States*, 980 F.2d 1342, 1344 (10th Cir. 1992); *Issner v. Aldrich*, 254 F. Supp. 696 (D. De. 1966); cf. S. REP. No. 95-1071 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2676, 2705 (noting that a list of names amounts to a precise statement). By the same token, when Commerce expressly omitted Transcom's Hong Kong exporters in its list of "132 and nine companies" (or "132 and nine companies plus a certain class"), it could hardly make a more precise statement.

Conversely, Commerce's descriptive statement that "[a]ll exporters of TRBs from the People's Republic of China [were] conditionally covered" was intended to be a general, broader statement subjecting the entries from indefinite entities Commerce was unable to designate

---

[6] Assuming that Timken's request for review was only valid with regard to "132 and nine companies," the list of these very same entities was actually spelled out in the *Notice of Initiation* and constituted a specific statement. *See* 60 Fed. Reg. 42,501-03. The effect would be the same if Commerce's review encompassed "132 and nine companies plus a certain class." The mere fact that the terms "China National Machinery Import and Export Corporation" or "Machinery Import and Export Corporation" provided by Timken were not recited in the *Notice of Initiation* changed nothing: the content of Timken's review request, a public document, was available and known to any entity in the industry and could have been read into the *Notice of Initiation* through Commerce's statement that "[a]ll exporters of TRBs from the People's Republic of China are conditionally covered". *See* Def.'s Mem. at 4, n.3; *see also supra* note 5.

specifically to the scope of the review.[7] See Def.'s Mem. at 48; Timken's Resp. at 10-11; *Transcom CAFC*, 182 F.3d 882-83; *Transcom CIT*, 24 CIT ___, ___, Slip op. 00-146 at 31 (citing to Def.'s Mem. Opp'n Pl.'s Mot. J. Agency R. at 43, *Transcom CIT*, 24 CIT ___, ___, Slip op. 00-146).

Consequently, the statement that Commerce was "not initiating an administrative review of any exporters and/or producers who were not [properly] named in [the] review request" was a more specific declaration than the statement that "[a]ll exporters of TRBs from the People's Republic of China [were] conditionally covered." The former statement controlled the latter one and justified Transcom's reasonable reliance. *See Kinney*, 812 F. Supp. at 550.

Furthermore, the sum of the conflicting statements constituted a notable deviation from the language Commerce used in its previous notices. Except for the notice of Initiation directly preceding that at issue, all of Commerce's previous notices of Initiation did not include any language either enlarging or limiting the scope of relevant reviews. *See Transcom CAFC*, 182 F.3d at 882. The notice of Initiation directly preceding that at issue included no scope-limiting language, it only provided that "[a]ll other exporters of tapered roller bearings [were] conditionally covered . . . ." *Initiation of Antidumping Duty Administrative Reviews and Request for Revocation in Part*, 59 Fed. Reg. at 43,539. This statement was apparently included by Commerce to alert the industry to an enlargement of the scope of Commerce's review. *See Transcom CIT*, 24 CIT ___, ___, Slip op. 00-146 at 27-29.

It was reasonable for a member of regulated industry such as Transcom to assume that the inclusion of the new, scope-limiting language into the *Notice of Initiation* at issue manifested Commerce's intent to amend Commerce's prior policy, curtail the scope of the pending review and alert the industry accordingly. *Cf. Chevron*, 467 U.S. at 845 (explaining that an agency may choose to reconcile and foster inconsistent goals and policies).

Agency statements provide guidance to regulated industries. There is, however, a distinct difference between the measure of guidance (and the ensuing industry responsibilities) created by a narrowly paraphrased unambiguous statement and the measure of guidance provided by a statement that is broad, general and descriptive. An industry member is expected to contact its regulating agency and inquire if the industry member finds a general descriptive term ambiguous and in need of clarification. *See Transcom CIT*, 24 CIT ___, ___, Slip op. 00-146 at 26-31. An inquiry, however, is not expected if the statement the agency makes is a precise pronunciation based on statutes, regulations and case law. Indeed, it would be anomalous to expect a mem-

[7] "Definitions necessarily are imprecise and ambiguous because they attempt to represent complex concepts and myriad factual scenarios using the imprecise medium of language. Imprecision and ambiguity are particularly common when . . . the concept underlying the definition is both non-observable and qualitative in nature." Kevin H. Smith, *Disabilities, Law Schools, and Law Students: A Proactive and Holistic Approach*, 32 AKRON L. REV. 1, 38 (1999).

ber of the industry to inquire whether the agency is aware of the applicable statutes, regulations and pertinent case law, or whether the agency actually meant to make the unambiguous statement it made. If, in addition to making an unambigious specific statement, the agency makes a conflicting general statement, it has nobody to blame but itself for the resulting confusion. *Cf. ITT World Communications, Inc. v. FCC*, 725 F.2d 732, 754 (D.C. Cir. 1984) ("[A]n agency does not act rationally when it chooses and implements one policy and decides to consider the merits of a potentially inconsistent policy in the very near future."); *Hamlin v. Hamlin*, 192 N.Y. 164, 168 (1908) (holding that a statement in a pronunciation by a tribunal inconsistent with another statement in the same pronunciation allows the affected party to rely in good faith upon the statement more favorable to the party's contentions).

To summarize, the statement that Commerce was "not initiating an administrative review of any exporters and/or producers who were not [properly] named in [the] review request" gave each member of the industry constructive notice and an implied promise that his entries would be excluded from the review and liquidated "at rates equal to the cash deposit of . . . estimated antidumping duties required on that merchandise at the time of entry" under 19 C.F.R. § 353.22(e) if the industry member was not properly identified in Timken's request. The inclusion of the statement that "[a]ll other exporters of tapered roller bearings [were] conditionally covered" created an element of confusion but did not change the message ensuing from the aggregated language of the *Notice of Initiation*.

3. *De Facto Admission of Being on Notice*

Timken alleges that Transcom's challenge to Commerce's *Preliminary Results*[8] indicated that Transcom was aware that its entries could be subject to the review. *See Timken Br.* at 14. The Court disagrees.

According to its own regulation, Commerce must publish its preliminary results together with an "invitation for argument." See 19 C.F.R. § 353.22(c)(5). The invitation for argument allows "*any interested party* or U.S. Government agency [to] submit a 'case brief'" contesting Commerce's preliminary results and to "present in full all arguments that[,] in the submitter's view [, are] relevant to [Commerce's] final determination or final results . . . ." 19 C.F.R. § 353.38(c)(1),(2) (1995) (emphasis supplied); *accord Preliminary Results*, 61 Fed. Reg. at 40,615. Nothing in the language of 19 C.F.R. § 353.38(c) requires the "interested party" to be an entity negatively affected by Commerce's final determinations. *See generally*, 19 C.F.R. § 353.38(c). Moreover, Commerce's own definition of "interested party" does not

[8] Transcom entered its notice of appearance, arguing that Commerce's application of the default PRC rate was invalid with respect to the entries from those entities that abstained from responding to the questionnaires because they were not properly designated in the *Notice of Initiation* and, thus, not notified of the pending review. *See Final Results*, 62 Fed. Reg. 6186-87.

include the requirement. *See* 19 C.F.R. 353.2(k).[9] Timken's interpretation adds an element not contemplated by Commerce to the language of 19 C.F.R. §§ 353.2(k), 353.38(c) and effectively substitutes Commerce's definitions with the implausible criterion based upon an entity's predictions about negative determinations Commerce could make in the future.

In addition, the inference of notice from the mere fact of an entity's comments to Commerce's preliminary results would have two undesirable effects: (1) it would defeat the goal of 19 C.F.R. § 353.38(c) that aims to encourage public participation in administrative process rather than to penalize participants; and (2) it would circumvent the notice requirements of 19 U.S.C. § 1675(a) and 19 C.F.R. § 353.22(c), both of which provide that a notice must be given at the outset of a review rather than inferred post factum from the entity's eventual comments.

An entity's good faith submission of a comment to Commerce's preliminary results made upon Commerce's own invitation should neither be interpreted as the entity's concession of being a party adversely affected by the determinations nor as an affirmation of being properly on notice. Holding otherwise would be as anomalous as stating that an amicus curiae admits being a properly served defendant if he files a brief with the leave of court.

II. *Other Contentions*

Other issues disputed by Transcom and Commerce include: (a) Commerce's right to subject Transcom's entries to the "best information available" ("BIA") rate resulting from the failure of Transcom's Hong Kong exporters to submit the information sought in Commerce's questionnaires; and (b) a violation of Transcom's Fifth Amendment procedural Due Process rights resulting from Commerce's insufficient notice. *See* Pl.'s Br. at 28-37; Def.'s Mem. at 52-57.

None of these issues, however, needs to be reached by the Court because Commerce's notice failed the threshold issue of procedural sufficiency. Commerce, therefore, is barred from the imposition of the determinations made in the *Final Results* upon the entries from Transcom's Hong Kong exporters and from the application of the default BIA rate to these entries. *See Transcom CAFC*, 182 F.3d at 880-81 (stating that (a) "it would be inappropriate for the government to 'resort[ ] to BIA for companies which were not specifically listed in the [N]otice of [I]nitiation and not issued their own questionnaires,' since those parties would have had 'no actual or constructive notice'";

---

[9] According to Commerce's definition, the term

> [i]nterested party means: (1) [a] producer, exporter, or United States importer of the merchandise, or a trade or business association a majority of the members of which are importers of the merchandise; (2) [t]he government of the home market country; (3) [a] producer in the United States of the like product or seller (other than a retailer) in the United States of the like product produced in the United States; (4) [a] certified or recognized union or group of workers which is representative of the industry or of sellers (other than retailers) in the United States of the like product produced in the United States; (5) [a] trade or business association a majority of the members of which are producers in the United States of the like product or sellers (other than retailers) in the United States of the like product produced in the United States . . . .

19 C.F.R. § 353.2(k).

and (b) the court "need not address Transcom's argument that the lack of notice of the scope of the administrative reviews violated Transcom's rights under the due process clause of the Fifth Amendment to the Constitution, because . . . Commerce's conduct . . . violated Commerce's statutory and regulatory notice obligations in connection with the administrative reviews.")

CONCLUSION

For the foregoing reasons, the Court finds the notice provided by Commerce in the *Notice of Initiation* procedurally deficient with regard to Transcom's entries from its Hong Kong exporters. This case is remanded to Commerce to liquidate Transcom's relevant entries at a rate equal to the cash deposit required on the merchandise at the time of entry pursuant to 19 C.F.R. § 353.22(e).

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C00/73 9/18/00 Aquilino, J.	Peterson Greaseproof Sales Co.	97-01-00143	4811.40.00 2.7%	4806.20.00 Duty free	Agreed statement of facts	Baltimore "Snopak Release" greaseproof paper
C00/74 9/18/00 Eaton, J.	Digital Equipment Corp.	97-10-01623	8471.93.20 3.7%	8471.93.15 Duty free	Agreed statement of facts	Denver computer disk drive assemblies
C00/75 10/4/00 Aquilino, J.	USR Optonix, Inc.	92-4-00231	3206.50.00 10%	3823.90 Free of duty	Agreed statement of facts	Newark Various types of zinc sulfides
C00/76 10/16/00 Goldberg, J.	Xerox Corp.	94-7-00429	3707.90.30 Various rates	As set forth on schedule A attached to stipulated judgement on agreed statement of facts	Agreed statement of facts	Newwark, NJ Buffalo Oklahoma, Parts and accessories of electrostatic photocopiers and laser printers
C00/77 10/16/00 Goldberg, J.	Xerox Corp.	96-11-02598	3707.90.30 Various rates	As set forth on schedule A attached to stipulated judgement on agreed statement of facts	Agreed statement of facts	Buffalo, Los Angeles, New York Parts and accessories of electrostatic photocopiers and laser printers
C00/78 10/16/00 Goldberg, J.	Xerox Corp.	96-12-02660	3707.90.30 Various rates	As set forth on schedule A attached to stipulated judgement on agreed statement of facts	Agreed statement of facts	Buffalo Parts and accesories of electrostatic photocopiers and laser printers

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C00/79 11/7/00 Pogue, J.	Brother Int'l Corp.	99-2-00102	8471.60.5200 1.5%	8471.60.6200 Free of duty	Agreed statement of facts	Los Angeles Laser printers

ABSTRACTED VALUATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	VALUATION	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
V00/20 10/24/00 Wallach, J.	San Juan Suzuki, Inc.	95-9-01166	Transaction value	F.o.b. prices, Shimuzu, Japan, charged by the Japanese manufacturer to Inter-america Trading Co.	Agreed statement of facts	San Juan Automotive vehicles

Index

Customs Bulletin and Decisions
Vol. 34, No. 50, December 13, 2000

U.S. Customs Service

Treasury Decisions

General Notices

CUSTOMS RULINGS LETTERS AND TREATMENT

Federal Recycling Program
Printed on Recycled Paper
U.S.G.P.O. 2000-472-776-20010

U.S. Court of International Trade

Slip Opinions

Abstracted Decisions

Federal Recycling Program
Printed on Recycled Paper
U.S.G.P.O. 2000-472-776-20010